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Plaintiff's Exhibit 22. 7615

The duty of this Committee is limited to the consideration of price on Blasting Powder. Our study of the present situation has been concentrated mainly upon three points, to wit:

FIRST: EFFECT OF EXISTING CONTRACTS.

SECOND: PRICE CLASSIFICATION.

THIRD: CLASSIFICATION OF CUSTOMERS.

7616

To secure the facts we have tabulated fully the records. Dealing with

FIRST. EFFECT OF EXISTING CONTRACTS.

It has been the general policy to cover the future demand by contracting for as lengthy a period as possible. There has been no universal policy adopted as to the form of contract; various forms are in use. Disregarding minor details, the contracts may be divided into two classes:

7617

(a) Those selling on the basis of a card rate, subject to change, from which basis the necessary deduction or concession is made. These contracts permit of a change in price.

(b) Those selling at a fixed price, which is a basis for the debate. These contracts permit of no change in price.

In addition to the trade covered by contract, there is the trade covered by Special Price. This trade also permits of a change in price.

Attached to this report you will find various exhibits.

7618 *Plaintiff's Exhibit 22*

Exhibit No. 1 gives a recapitulation of all contracts.

Exhibit No. 2 gives a separate recapitulation of what we have termed Class "A" Contracts, being those which permit of a change in price.

Exhibit No. 3 gives a summary which shows the extent to which a change in price will be affected by existing contracts.

Class "A" Contracts and Special Prices being susceptible to the change, it is only necessary to
7619 eliminate from the total estimated sales the fixed contracts, on which no change can be made. We have estimated the sales for the next four years on the basis of 4,000,000 kegs per annum. We take this figure notwithstanding the fact that the total business has increased at the rate of from 17% to 20% per annum for the last five years, because it may be conservative to anticipate some cessation of the phenomenal period of prosperity during the next four years, and also because a safe estimate can be obtained regardless of exact accuracy in the
7620 total sales. On this basis, it will be found that if it is decided to advance the price, such advance would be immediately applicable as follows:

In 1903—Advanceable, 71 3/4%; not advanceable, 29 1/4% of total business.

In 1904—Advanceable, 88 1/2%; not advanceable, 11 1/2% of total business.

In 1905 and 1906 the percentage of fixed contracts is small.

It is a matter of consideration as to how far the amount of fixed contracts will operate to interfere with an advance in the price of powder.

A study of Exhibit No. 3 will show that the fixed contracts cover a larger section of the country than the advanceable contracts of "Class A." It is a fact, therefore, that what will be low-priced

trade in the event of an advance will be generally scattered. We believe it safe to assume that the fixed contracts will not prohibit an advance.

First: Because the total percentage is small, and as the fixed contracts are practically scattered all over the country, the effect at any one point is minimized.

Second: Because those in possession of the low priced contracts will have no inducement to compete with the Powder Companies by reselling if they have any faith in the stability of the advance. An individual price may be low from one of two causes: Viz:—By means of a concession or by means of an advance. 7622

Under the present system there has been a direct advantage to every purchaser in spreading broadcast any concession obtained in price, because under that system a low price has always belonged to the first category. But when a price becomes low from the second cause, it is not generally in human nature to give away the advantage. 7623

We believe, therefore, that existing contracts leave us in a position to advance prices if so determined.

SECOND: PRICE CLASSIFICATION.

We refer to Exhibit No. 4, in which we have classified all the trade covered by Contract and Special Price for one year. We have divided the business into twelve classifications, starting with the Classification of Customers No. 1, representing those whose demand consists of 1200 kegs per annum, or less, and ending with Classification No. 12, representing that combination of customers (dealt with as a unit) taking from 75,000 to 100,000 kegs per

7624 *Plaintiff's Exhibit 22*

annum. We give the average price and the number of customers in each classification. A study of this exhibit, when taken in connection with Exhibit No. 5, will be of interest.

It is generally an admitted law of business that in the matter of LOW PRICES the pace is set by the largest consumer, and that the AVERAGE has to be maintained by an increase of price to the smallest consumer. We are familiar with the constant argument advanced at our meetings, "That a
7625 given consumer was entitled to a reduction on account of the magnitude of his business." We would, therefore, anticipate that the largest customer was that of the lowest price, and that in every other classification reduced consumption would be followed by a higher basis. A glance at the average price in Exhibit No. 4 will dispel this allusion. It will be noted that that classification of the trade taking the largest total number of kegs is Classification No. 7, consisting of forty-six customers. We will take this as a dividing line. The average price
7626 of this classification is $1.1339. The average price of Classification No. 1 (smallest trade, consisting of 419 customers, is $1.155, whereas the average price of Classification No. 12 (largest trade, consisting of only two customers), is $1.10.

The intermediate prices, while they show some variation, is no place to indicate the law. Exhibit No. 4 was prepared believing that difference in price between these classifications should be great enough (considering that they apply to the whole country), to eliminate all other considerations, even that of difference of freight.

A further study was then made, as shown in Exhibit No. 5, in which the country was divided into such sections as had developed distinct features as separate districts, to wit:

Plaintiff's Exhibit 22 7627

THE WESTERN DISTRICT,
THE SOUTHERN DISTRICT
AND THE CENTRAL DISTRICT.

It was hoped when the disturbance of differences in freight was eliminated, some indication would be found of that difference in price would should exist. The results show that the general average price in the Western District is $1.76. In the Southern District $1.152. In the Central District $1.10. While this Division shows some difference in 7628
price to the different districts, when we look in each separate district for a proper difference between classifications we do not find it.

TAKING THE WESTERN DISTRICT, with Classification No. 8 as a dividing line (consisting of nine customers) at an average price of $1.17. We come to Classification No. 1 (smallest trade, consisting of thirty-three customers) at an average price of $1.266, and to Classification No. 12 (largest trade, consisting of three customers) at an average price 7629
of $1.10.

In the SOUTHERN DISTRICT, taking Classification No. 7 as the dividing line, we find the average price $1.166, the highest price $1.216 and the lowest price $1.00. In both of these Districts there is some evidence of discrimination, particularly in the Western District. Nevertheless, there is nothing like that distinction in price that should exist, and if we study the intermediaries, not anything like the regularity that should exist in the difference.

But when we come to the CENTRAL DISTRICT, where the dividing line is again Classification No. 7, what do we find? An average price of $1.08, a maximum price of $1.12, and a minimum price of $1.05, so small a difference as to be unworthy of

consideration, and it should be remembered that the Central District represents in a large degree the largest market of all.

We believe that this study indicates that there is some great evil underlying our methods of selling. What this evil may be, and what its remedy is, perhaps, not within our province to discuss, beyond the suggestion that it must be based upon an unintelligent internal competition. We urge that until a proper variation in price be maintained as
7631 between the different classifications, our selling will not be logical, and, therefore, our prices cannot hold.

THIRD: CLASSIFICATION OF CUSTOMERS.

There are many indications that the present handling of this matter is leading to inconsistency in relative price. A salesman (on representation of his customer) puts forward a suggestion for a low price on the theory that the demand of the said customer will reach eight, ten or twelve thousand
7632 kegs per year, as the case may be. The price is given on this hypothesis and at the end of the year it is found that the customer's total consumption has been exaggerated in his effort to secure a low price. It is well within our power, as it would be just, to classify such customers at a figure that we know to be safe, with the agreement that should their consumption exceed the assumed amount, a rebate will be allowed them in cash at the end of the year, based not upon a supposition, but upon the actual amount of powder received by said customer.

SPEAKING GENERALLY.

Refer now to Exhibit No. 6. By the courtesy of a leading Company we are permitted to exhibit the

average of its prices for the last ten years. An examination of this will show that the history of the powder business has been that of a steady reduction in price up to the year 1896. The lowest price reached is contemporaneous with the lowest price basis in this country of all other staples: so far so good. But going beyond this, it shows none of the reaction towards higher figures that has ruled in every other business in the years following, viz: 1896 to 1902. Prices generally have increased over 100% in other staples during the last five 7634
years. This is true of those businesses that were subject to the keenest and FREEST COMPETITION in common with the rest. In powder we find the increase has been from $ .98 in 1896 to $1.14 to date in 1902, an increase of only 16 cents. We believe that the price of today is abnormally low.

It does not suffice to say that at today's prices there is a fair margin of profit, because the fact is that at today's prices there ought to be something more than a fair margin—there should be a heavy margin of profit, and in the fact that there is not 7635
we see a menace to the future of the business. The present phenomenal prosperity cannot last—if past history is to guide us we must assume that it will be followed by a period of reaction. During this period of reaction the price of powder must come down heavily. When the demand comes from our customers to reduce the price when everything else is being reduced, it will be no answer to say that we did not advance it when we could. During periods of depression the purchaser—not the seller—is in control of the market, and the irresistible logic of all past history shows that his control is absolute. In a country of such trade irregularities as that of the United States, it is only by a high profit during periods of prosperity that a fair re-

7636 *Plaintiff's Exhibit 22*

turn to capital can be maintained in face of the minimum that follows the period of trade distress.

But more important than the question of present profit is that of prevention of future loss, it being remembered that the period of low prices does always average longer than that of high prices. An advance, if made now, will come too late to do much in the way of present profits, but it will at least give us the margin from which to reduce when this has to be done.

7637 We need not delude ourselves by feeling that we can stem a natural reduction by any co-operation or understanding among ourselves. When the result of all our efforts at co-operation has led to a continual reduction of price during periods of prosperity, it needs no great intelligence to surmise what the effect of that co-operation will be during a struggle against adversity.

We have consulted fully with the Sales Agent—the man in direct touch with all of our customers. We find them advocating a prompt and liberal ad-

7638 vance. They state that their trade is prepared for it, and even speculating why it has not occurred sooner.

CONCLUSION.

In view of the above the Committee recommends:

(A) That the following prices be established in the CENTRAL DISTRICT: Carload lots $1.35 per keg.

Trade running from 1200 to 2399 kegs per annum a rebate of 10c per keg.

Trade running from 2400 to 4999 kegs per annum a rebate of 15c per keg.

Trade running from 5000 to 9999 kegs per annum a rebate of 17 1/2c per keg.

Trade running from 10000 to 24999 kegs per annum a rebate of 20c per keg.

Trade running above 25000 kegs per annum a rebate of 22 1/2c per keg.

(B) That prices be advanced in the other DISTRICTS to correspond, with the exception of the disturbed DISTRICT in the East.

(C) That the above advances in prices be doubled, provided the Committee on Competition 7640
will provide machinery which in the judgment of the Advisory Committee will restrain internal competition and which will put the question of external competition into the hands of a properly organized Working Committee.

(D) That Contractors on Railroad work be treated as a class unto themselves, and to be given a price to apply to work in all districts at the discretion of the Advisory or Special Committee, with a rebate of not to exceed 15c from the carload price.

7641

(E) That all Customers shall be classified according to their past consumption, and shall receive only an increased rebate when they have purchased powder to the extent which will entitled them to such a rebate.

(F) That to Dealers now enjoying special prices and to those under contract, special prices be authorized of $1.25 per keg East of the Mississippi River and $1.35 per keg West of the Mississippi River, in carload lots, with corresponding prices in other DISTRICTS where necessary.

(G) That the price of Powder to Fireworks

7642 *Plaintiff's Exhibit 22*

Manufacturers be $3.00 per keg, and the terms 60 days net with a discount of 5% cash if the bill is paid within ten days.

(H) That all expiring contracts before renewal be referred either to the Advisory or Special Committee.

(I) That the change in price shall take imme-
7643 diate effect.

7644

Plaintiff's Exhibit 22 7645

EXHIBIT NO. 1.

RECAPITULATION.

All Contracts.

Name of Company.	1903 No. Kegs.	1904 No. Kegs.	1905 No. Kegs.	1906 No. Kegs.	Average Price
					7646
DuPont & Co.	505900	315672	129892	34400	1.153
Hazard Company	145398	69625	21990		1.103
Laflin & Rand	231325	9485	1150		1.141
Equitable Co.	60107	26292			1.146
Oriental Co.	32670	435			1.260
Birmingham Co.	———	———			———
Ohio Company	2775				1.148
Miami Company	97080	24535			1.079
King Company	53810	33885	16345		1.101
American Company	2575				1.190
Chattanooga Co.	106162	32000	5100		1.097
Austin Company	41637	650			1.075 7647
Phoenix Company	33016	7065			1.171
Schaght Co.	———	———	———		———
Sycamore Company	18500	1050			1.221
Indiana Company	95286	94086	85236	83806	1.115
Northwestern Co.	5760	5760	5760	5760	1.10
					"R. S. W"
TOTAL	1431991	620540	265473	123966	

The above excludes deliveries on expired contracts.
Above figures checked second time by Mr. Maclem & R. S. W. Jr.
"R. S. W. G. M."
Prepared for and attached to Mr. Moxham's address.
"R. S. W."

7648 *Plaintiff's Exhibit 22*

EXHIBIT NO. 2.

RECAPITULATION.

CLASS "A" CONTRACTS.

	Name of Company.	1903 No. Kegs.	1904 No. Kegs.	1905 No. Kegs.	1906 No. Kegs.	Average Special Price
7649	DuPont & Co.	217413	137800	42390		
	Hazard Co.	59990	16575	25		
	King Co.	7845				
	Chattanooga Co.	9200				
	Oriental Co.	1450				
	Ohio Co.	670				
	Austin Co.	1200	650			
	Phoenix Co.	3200	2800			
	TOTAL	300968	157825	42415		

7650

EXHIBIT NO. 3.

SUMMARY.

(Estimating total output at 4,000,000 kegs for each year.)

	1903	1904	1905	1906
Fixed Contracts	1,131,023	462,715	223,058	123,966
Advanceable "	300,968	157,825	42,415	
Sp'l or unsold	2,568,009	3,379,460	3,734,527	3,876,034
	4,000,000	4,000,000	4,000,000	4,000,000
Fixed contracts	28-1/4%	11-1/2%	5-1/2%	3%
Advanceable	71-3/4%	88-1/2%	94-1/2%	97%

Plaintiff's Exhibit 22 7651

EXHIBIT NO. 4.

Contract and Special Price Trade (Everything but current orders) From July, 1901, to July, 1902.

RECAPITULATION.

No. of customers.		Total No. Kegs used in one year All Co's.		Average Price	
419	Classification No. 1			H-1.85	7652
	1200 kegs and less	281734	$1.155	L-1.05	
195	Classification No. 2			H-1.45	
	1201——2400 kegs	355116	1.149	L-1.10	
88	Classification No. 3			H-1.30	
	2401——3600 kegs	259362	1.142	L-1.05	
49	Classification No. 4			H-1.35	
	3601——4800 kegs	201463	1.1399	L-1.05	
49	Classification No. 5			H-1.35	
	4801——6400 kegs	274841	1.136	L-1.00	
37	Classification No. 6			H-1.35	
	6401——8800 kegs	273540	1.1528	L-1.05	
46	Classification No. 7			H-1.30	7653
	8801——16000 kegs	537519	1.1339	L- .92	
20	Classification No. 8			H-1.35	
	16001——24000 kegs	372358	1.122	L-1.00	
6	Classification No. 9			H-1.30	
	24001——40000 kegs	191971	1.10	L-1.00	
1	Classification No. 10			H-1.20	
	40001——50000 kegs	41650	1.20	L-1.20	
4	Classification No. 11			H-1.15	
	50001——75000	237912	1.073	L-1.00	
3	Classification No. 12			H-1.15	
	75001——100000 kegs	259503	1.10	L-1.00	
918	TOTAL	3286969	$1.1309		

NOTE: (This statement is made on basis of $1.25 list price in Pennsylvania—List price in that State is now $1.15.)

RECAPITULATION.

	Western Dist.			So. Dist.			Central Dist.		
	No.	Kegs.	Av. Pr.	No.	Kegs.	Av. Pr.	No.	Kegs.	Av. Pr.
Class No. 1 1200 kegs of less	33	25287	$1.266	82	54444	$1.216	299	198560	$1.12
Class No. 2 1201—2400 kegs	27	48091	1.266	32	54842	1.211	135	251062	1.121
Class No. 3. 2401—3600 kegs	13	38871	1.227	11	34920	1.184	63	185571	1.116
Class No. 4. 3601—4800 kegs	9	37975	1.236	1	4259	1.25	38	154429	1.115
Class No. 5. 4801—6400 kegs	10	56837	1.215	3	18100	1.216	36	199904	1.10
Class No. 6. 6401—8800 kegs	10	73653	1.24	5	38800	1.146	22	161087	1.11

Plaintiff's Exhibit 22

(*Exhibit No. 5, Cont'd.*)

Class No. 7.									
8801—16000 kegs	11	132170	1.226	9	105487	1.166	26	299862	1.08
Class No. 8.									
16000—24000 kegs	9	169420	1.17	1	16270	1.00	10	186668	1.089
Class No. 9.									
24001—40000 kegs	1	37200	1.30				5	154771	1.052
Class No. 10.									
40001—50000 kegs	1	41650	1.20						
Class No. 11.									
50001—75000 kegs	2	131112	1.113	1	54900	1.00	1	51900	1.05
Class No. 12.									
75001—100000 kegs	3	259503	1.10						
Total		1051769	1.757		382022	1.152		1843814	1.10

7650 7658 7657

Plaintiff's Exhibit 22

2553

7660 *Plaintiff's Exhibit 22*

(Exhibit No. 5, *Continued*)

1—*Western District.*

All territory West of the Mississippi River and including Wisconsin and the Northern Peninsula of Michigan.

2—*Western District.*

7661 Territory East of the Mississippi River and South of the Ohio River, including the States of Kentucky (excepting Ohio River points in Kentucky north of Owensboro); Tennessee, Mississippi, Alabama, Georgia, North Carolina, South Carolina, Florida and Virginia (excepting in nine counties of the Southwest corner of Virginia, and the Counties of Allegheny, Botetourt and Craig on the C. & O. railroad in Virginia adjoining the West Virginia coal field).

7662 3—*Central District.*

Southern New York, Pennsylvania (outside the Anthracite Region), Maryland on the B. & O. Railroad, West Virginia, the twelve counties in Virginia excepting No. 2 and which are adjacent and part of the West Virginia coal field, Ohio, Indiana, Illinois, Michigan, excepting the Northern Peninsula.

Plaintiff's Exhibit 22 7663

(Exhibit No. 5, *Continued*)

	Western Dist. Prices	Southern Dist. Prices	Central Dist. Prices
Classification No. 1	H-1.40	H-1.35	H-1.45
	L-1.10	L-1.10	L-1.05
Classification No. 2	H-1.45	H-1.30	H-1.30
	L-1.10	L-1.10	L-1.05
Classification No. 3	H-1.30	H-1.25	H-1.20
	L-1.10	L-1.09	L-1.05 7664
Classification No. 4	H-1.35	H-1.25	H-1.20
	L-1.15	L-1.25	L-1.05
Classification No. 5	H-1.35	H-1.25	H-1.15
	L-1.10	L-1.20	L-1.00
Classification No. 6	H-1.35	H-1.25	H-1.15
	L-1.10	L-1.10	L-1.05
Classification No. 8	H-1.35	H-1.00	H-1.15
	L-1.02	L-1.00	L-1.05
Classification No. 7	H-1.30	H-1.25	H-1.15
	L-1.15	L-1.10	L- .92
Classification No. 9	H-1.30	———	H-1.10 7665
	L-1.30	———	L-1.00
Classification No. 10	H-1.20	———	———
	L-1.20	———	———
Classification No. 11	H-1.15	H-1.00	H-1.05
	L-1.10	L-1.00	L-1.05
Classification No. 12	H-1.15	———	———
	L-1.00	———	———
TOTAL	H-1.45	H-1.35	H-1.45
	L-1.02	L-1.00	L- .92

7666 *Plaintiff's Exhibit 22*

EXHIBIT NO. 6.

Year.	Kegs.	Average Price.
1890 (Jany. to June)	145,235	$1.65
1891 (June 1890 to June 1891)	171,100	1.55
1892 (June 1891 to June 1892)	151,833	1.52
1893 (June 1892 to June 1893)	174,519	1.22
1894 (June 1893 to June 1894)	128,058	1.07
1895 (June 1894 to June 1895)	151,315	.995
1896 (June 1895 to June 1896)	171,692	.92
7667	Avg.	.98
1896 (July to December)	103,000	1.09
1897 (Jany. to December)	173,879	1.24
1898 (Jany. to December)	145,349	1.266
1899 (Jany. to December)	230,786	1.214
1900 (Jany. to December)	284,700	1.183
1901 (Jany. to December)	292,422	1.173
1902 (To Sept. 1st)	216,890	1.14

7668 **Plaintiff's Exhibit 26.**

New York, August 26th, 1895.

Mr. J. G. Miller,
C/o Atchison, Topeka & Santa Fe R. R.,
Chicago, Illinois.

Dear Sir:

Enclosed herewith I hand you a copy of Circular Letter notifying the several offices of your appointment as General Sales Agent.

Kindly make an estimate with Mr. Vehmeyer of the cost of the changes you desire in our Chicago office and we will, if possible, authorize the expenditure.

Plaintiff's Exhibit 26 7669

Regarding our relations with Du Pont & Company and other Powder Companies, would say that I can best give you our desires by quoting from Circular Letter issued some time ago, outlining the policy we thought best, as follows:

"From time to time Trade Report Calls "will be sent out and we would indicate pol- "icy to be pursued in certain cases as far as "local conditions will permit.

"While we are very anxious to enlarge our 7670
"trade and agents will use their utmost en- "deavors to achieve that end, it is not worth "while to divert trade from associate com- "panies such as DuPont, Hazard, Oriental, "Ohio, etc., by cutting prices, as such a "course will probably result in their meeting "the price or perhaps cutting it and regain- "ing the trade, which merely hurts the for- "mer seller and does no one any good except- "ing the buyer.

"If, however, trade has been diverted from "us we want it back and you will at the earli- 7671
"est opportunity examine your records care- "fully and make Trade Reports on any for- "mer customers that may have been taken "from you within the last few years, explain- "ing as fully as possible the conditions, past "and present, and write asking for assist- "ance when prices given you are not low "enough to enable you to recover lost ground.

"In making Trade Reports agents and "salesmen will be particular to give as far as "possible the retail price or prices, as well as "price bought at, of loaded shells, smokeless "powder, etc., in order that we may get some "idea of the margin in the business for mid- "dle men.

7672 *Plaintiff's Exhibit 26*

"As our interest in The Repauno Chemical "Company and The Hercules Powder Com- "pany is very large, it is our desire that "agents and salesmen assist them as much as "possible in marketing their goods whenever "it can be done without cutting the prices of "or interfering with The Atlantic Dynamite "Company, Aetna Powder Company or The "Hecla Powder Company, and in case a "buyer visited uses or buys dynamite the
7673 "amount used, kind, price and of whom pur- "chased should be touched on in Remarks of "Trade Reports."

The gist of the whole matter is that if trade has been taken from us *we want it back,* but we do not think it wise to divert trade from DuPont, Hazard, Miami, Austin or Oriental Companies by cutting as that would merely lead to retaliation and do no one any good. In cases where we could divert trade from our so called associates we should prefer part
7674 rather than all and with no more fuss than necessary.

Regarding matter of desk and chair: Would authorize you to purchase a suitable desk and chair, sending bill to us. Would also suggest that some file cabinet which could be locked might also be a good thing for you to have for your private correspondence.

Yours very truly,

J. A. HASKELL,
President.

Enclosure/

Plaintiff's Exhibit P-36. 7675

THIS CONTRACT, made between E. I. du Pont de Nemours Co. of New Jersey, first party, and Howarth & Taylor of Edwards, Illinois, second party.

WITNESSETH: That first party hereby sells, and second party buys all the Black Blasting Powder, in kegs twenty-five (25) pounds each, required for use in the mines owned or controlled by second party as noted below, for the period of three (3) years from this date, at the current carload price established by first party, at the location named, at the time of receipt of order, the present carload price being $1.35 per keg. 7676

In consideration that this contract is to run for a term of three years, it is hereby mutually agreed that should Nitrate of Soda in New York market advance above $1.80 per cwt., then the price of powder under this contract fluctuates one cent per keg for every 5c per cwt. on Nitrate of Soda, but when said Soda is at or below $1.80 per cwt., the price of powder shall be per keg as the price indorsed hereon. 7677

The following conditions are mutually accepted:

(a) First party agrees to allow second party a rebate upon powder purchased under this contract as follows:

In 400 keg deliveries, f.o.b. rails, Edwards, Ill., 15c per keg; in deliveries of 800 kegs (or full car) one delivery, rebate shall be 17½c per keg; all emergency requirements necessitating deliveries from magazine stocks at Peoria, Ill., shall be at full card price—$1.35 per keg.

(b) As specified in paragraph (a), first party

7678 *Plaintiff's Exhibit P-36*

agrees to allow second party actual carload freight charges from shipping to delivery points when required and accepted in not less than 400 keg lots.

(c) TERMS are 60 days, or two per cent (2%) discount for each if remitted within ten days from date of invoice.

(d) Second party agrees to buy from first party either du Pont or Hazard black blasting powder when to be delivered at their mines located as here-
7679 inafter indicated, in 400, 800 or more kegs of twenty-five lbs. each at each delivery.

NAME	LOCATION
Howarth & Taylor,	
Mines at	Edwards, Ill.

or for any other mines that may be acquired by the second party, in the same district, during the time of this contract.

(e) It is agreed that powder furnished under this contract is for consumption of the second party only and not for sale, except to its own miners or
7680 employees. It is agreed that a violation of this clause gives for first party the option of cancellation of this contract.

(f) The first party may furnish, and second party will accept under this contract du Pont or Hazard brand of powder as the second party may require.

(g) The first party is not to be responsible for delays by strikes, accidents, or causes beyond its control.

Dated at Edwards, Ill., November 1, 1904.

E. I. DU PONT DE NEMOURS CO.,
by Eugene du Pont, Pres.
Howarth & Taylor.

Plaintiff's Exhibit P-36 7681

For and in consideration of the sum of One Dollar ($1.00) and other valuable consideration, to it in hand paid at and before the delivery of these presents by E. I. du Pont Company (the receipt whereof is hereby acknowledged), the undersigned hereby assigns, sells, transfers and sets over to said E. I. du Pont Company all its right, title and interest in and to that certain contract between the undersigned and Howarth & Taylor of Edwards, Illinois, dated the First day of November, 1904, which is hereto attached and hereby made a 7682
part hereof.

It is agreed that the acceptance of this Assignment by the said E. I. du Pont Company shall constitute an agreement on its part to assume and discharge all of the obligations and liabilities of said contract on the part of the undersigned.

IN WITNESSETH WHEREOF, the undersigned corporation has caused these presents to be signed and its corporate seal to be affixed hereto on this 20th day of February, 1905.

7683

E. I. DU PONT DE NEMOURS CO. OF N. J.,
Eugene du Pont, President.

ATTEST:

Edward S. Lentilhon,
Assistant Secretary.
Seal.

Seal.

7684

Plaintiff's Exhibit 36.

THIS AGREEMENT, made this Second day of October, A. D. nineteen hundred and two, between John L. Riker, of the City of New York and State of New York, party of the first part, and Delaware Securities Company, a corporation existing under the laws of the State of Delaware, party of the second part.

WHEREAS, the party of the first part has for
7685 many years last past been engaged in the manufacture and sale of powder and other explosives.

AND WHEREAS, the party of the second part has agreed to purchase from the party of the first part all of his shares of the capital stock of the Laflin and Rand Powder Company, a corporation engaged in the manufacture of powder, a part of the consideration for which purchase is the agreement by the party of the first part herein contained,

7686 AND WHEREAS, the party of the second part has as part of its assets a portion of the capital stock of the Laflin and Rand Powder Company, and as such is interested in the business of manufacturing and selling powder and other explosives.

NOW, THEREFORE, in consideration of the premises, and of the purchase of the said stock of the said party of the first part, as well as for and in consideration of the sum of Five Hundred Thousand Dollars and sundry other good and valuable considerations, by the party of the second part to the party of the first part in hand paid, at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, the party of the first part hereby covenants and agrees to and with

the party of the second part, and its successors, that he shall not and will not, for the period of twenty-five next immediately ensuing the date of this agreement, be directly or indirectly engaged in or interested in the manufacture or sale of powder, or any other explosive, within any of the United States of America or the District of Columbia, excepting the State of Florida, and that the said party of the first part shall not and will not be directly or indirectly the owner of or interested in the stock of any company or corporation where- 7688
soever incorporated, which company, or corporation, shall be engaged in the manufacture or sale of powder, or other explosives, within the territory and for the time aforesaid; provided, however, that nothing contained in this agreement shall prevent the party of the first part from being directly or indirectly the owner of or interested in the stock of any company, or corporation in which the said party of the second part, E. I. du Pont de Nemours and Company, or said Laflin and Rand Powder Company, may or shall be interested, or to prevent the party of the first part from being 7689
connected with such company, or companies, whether as a stockholder, employee, agent, or otherwise, or from being directly or indirectly interested in the manufacture and sale of Chlorate of Potash, it being the purchase and intention of this agreement that the party of the first part shall not be directly or indirectly interested in the manufacture, or sale of powder or other explosives, which shall come in competition with the product of the party of the second part, or any of the companies in which it is now or may hereafter become interested, except as herein stated.

IN WITNESS WHEREOF, the party of the first

7690 *Plaintiff's Exhibit 36*

part hath hereunto set his hand and seal, and the party of the second part, hath caused these presents to be executed by its President, and its corporate seal to be hereunto affixed, the day and year first aforesaid.

(S) WM. BARCLAY PARSONS

[SEAL]

DELAWARE SECURITIES CO.,
By A. J. Moxham,
President.

7691

Signed, Sealed and Delivered
in the presence of
(S) Samuel Riker, Jr.
Attest,
(S) L. L. Dunham,
Secretary.

[As a part of the foregoing Exhibit there appears three other agreements exactly similar to the foregoing except as to the names of the first parties and the date and the consideration. One is dated
7692 October 2, 1902, William Barclay Parsons, a party of the first part, and the consideration, $75,000; a second dated October 6, 1902, H. de B. Parsons, the party of the first part, and the consideration, $60,000; a third dated October 2, 1902, Schuyler L. Parsons, the party of the first part, and the consideration, $150,000.]

Plaintiff's Exhibit 42 (Government's Exhibit 286). 7693

MEMORANDUM OF AGREEMENT, made and entered into this day of January, 1903, by and between R. S. Waddell and T. C. du Pont, representing ———— Powder Company or Companies (hereinafter called the Powder Company).

WITNESSETH, that whereas R. S. Waddell has been associated with the Powder Company for a great many years past and whereas his associations with said Powder Company have been entirely satisfactory and whereas he recently moved from Cincinnati to accept the position of General Sales Agent of said Powder Company on trial, and whereas that position is not entirely agreeable or congenial to him, and whereas said R. S. Waddell is desirous of building a powder plant and is further desirous of having associated with him the Powder Company with which he has been so long connected and he is also desirous of owning 51% of the stock of said (————) powder company (hereinafter called the New Company), in his own name and right, and whereas, the Powder Company does recognize the ability and appreciate the long and faithful service of R. S. Waddell and whereas they desire to increase their business and output to meet the growing demands for their product in the United State and whereas the said Powder Company is willing that said R. S. Waddell should be the owner of the majority of the stock of the New Company under conditions hereinafter set forth, 7694 7695

NOW THEREFORE it is agreed and understood that the said R. S. Waddell shall organize the New Company under the laws of the State of Delaware with a capital stock of $75,000.00, 51% of which shall be subscribed to and paid for by R. S. Wad-

7696 *Plaintiff's Exhibit 42*

dell and 49% of which shall be subscribed to and paid for by the Powder Company.

The said New Company to build mill or mills at a point or points in the United States to be agreed upon by said R. S. Waddell and said Powder Company. The capacity of said mill or mills to be 1,200 kegs per diem. The machinery for the manufacture of powder to be approved by the Powder Company.

Either one of the existing powder companies or a
7697 new company to be organized (hereinafter called the Selling Company) to enter into an agreement with the New Company under which agreement the New Company agrees to make and the Selling Company agrees to sell annually for a term of ten years with the privilege of two renewals of five years each, 250,000 kegs of blasting powder to be furnished in approximately equal monthly quantities. It being understood that if by accident or otherwise the New Company is prevented from furnishing equal installments in any one calendar
7698 quarter they may make up the shortage in the quarter following but the privilege to make up this shortage shall not extend, except by permission of the Selling Company, over a second quarter. (Stop)

The price of said powder sold by the New Company to the Selling Company to be $1.00 per keg f.o.b. mill or mills of the New Company? The quality of said powder is guaranteed by the New Company to be equally as good as the powder made by other standard companies owned or controlled by the Powder Company.

It is understood that the price above-mentioned of $1.00 per keg is based upon the cost of nitrate of soda in New York, and that should nitrate of soda be above $1.90 per hundred pounds then for every

Plaintiff's Exhibit 42 7699

five cents above $1.90 per hundred pounds that nitrate of soda advances the price of powder is to advance one cent per keg of twenty-five pounds. Should the price of nitrate of soda in New York be below $1.50 per hundred pounds then the price of powder to be reduced one cent per keg of twenty-five pounds for every five cents below $1.50 nitrate of soda declines.

IT IS FURTHER AGREED that should the Selling Company desire more than the 250,000 kegs 7700
which they above agree to take up to the capacity of the mill or mills of said New Company, then the price for the powder in excess of 250,000 kegs per annum shall be sold by the New Company to the Selling Company at the same price which is made for powder sold as between other powder companies (now 80c).

IT IS AGREED and understood that the salary of R. S. Waddell, who is to be President of the New Company, shall be $10,000.00 per annum, with 7701
no further compensation for other work.

It is further agreed and understood that there shall be five directors, three of whom are to be named by R. S. Waddell and two of who mare to be named by the Powder Company.

It is further understood that R. S. Waddell is to look after the selling of the powder produced by the New Company.

It is further agreed that the Selling Company shall give to R. S. Waddell a guarantee that they will sell and pay for at $1.00 per keg 250,000 kegs per annum, and a further guarantee to the New Company that they will pay for at the exchange price between powder companies any powder above 250,000 kegs per annum that they may purchase.

7702 *Plaintiff's Exhibit 42*

The said R. S. Waddell being in absolute control of the New Company through his ownership of 51% of the stock agrees to give a satisfactory guarantee that he will not produce, sell or offer for sale more than the 250,000 kegs per annum or such further quantity as may be ordered by the Selling Company and agrees further that he will not go into the powder busines or the explosives business either directly or indirectly except by consent of the Powder Company first above-mentioned. That
7703 the salaries of office employees will not be raised except by a unanimous vote of the directors and that the Powder Company will have the right to name two directors.

The said R. S. Waddell is to say what will be a satisfactory guarantee that the Selling Company will perform its part of this contract during its entire term, and the said R. S. Waddell agrees to hypothicate 2% of the stock of the New Company standing in his name as a guarantee that he, his heirs, executors and assigns will fulfill their part of
7704 the terms of this contract. The voting power of said stock and the dividends accruing on said stock to belong to R. S. Waddell.

IN WITNESS WHEREOF R. S. Waddell and T. C. du Pont have hereunto set their hands and seals the day and year first above written.

Plaintiff's Exhibit 43 (Government's Exhibit 287). 7705

Buckeye Powder Co. incorporated under the Laws of Delaware. Capital stock $75000.00 divided into 1500 shares of $50.00 each.

R. S. Waddell owning 51% equal to 765 shares.

L. & R. Powder Co. owing 49% equal to 735 shares.

Capital to be paid in, ten per cent at time of incorporation, balance proportionately as called for by the board of directors.

To erect two powder mills having a total capacity of 1200 kegs per day. The larger mill located near Peoria, Galesburg of Sprinfield, Ill. The smaller one near Kenova, W. Va. 7706

Directors:

R. S. Waddell
N. C. Waddell
R. S. Waddell, Jr.
A. J. Moxham
J. A. Haskell

Officers:

R. S. Waddell	President.	7707
Vice	"	
R. S. Waddell, Jr.	Secretary.	
	Treasurer.	

By Laws:

Capital stock cannot be increased except by vote two thirds (2/3) of the total number of shares of stock.

No change in the By-Laws, except by vote of the same proportion of the total shares.

No mortgage on the property of the Company shall be given, except by vote of the same proportion of the total shares.

Cumulative votes by stockholders for directors to be allowed.

Salaries:

7708 *Plaintiff's Exhibit 44*

The President's salary shall be fixed by the By-laws at $10000.00 per annum and shall not be raised or changed during the term of service of R. S. Waddell.

Plaintiff's Exhibit 44 (Government's Exhibit 288).

Contract—see R. S. W's letter 1/13-03.

7708

By Mr. Hilles from notes of Mr. T. C. DuPont.

THIS AGREEMENT, made this day of January, A. D. nineteen hundred and three, by and between Robert S. Waddell, of the City of Wilmington, New Castle County and State of Delaware, party of the first part, and E. I. du Pont de Nemours and Company, a coporation existing under the Laws of the State of Delaware, party of the second part, WITNESSETH:

7710 THAT WHEREAS, the party of the first part has been associated with the party of the second part for a great many years last past,

AND WHEREAS, his associations with said Company have been entirely satisfactory.

AND WHEREAS, he has recently accepted the position of Central Sales Agent of the said party of the second part, which position is not entirely agreeable, or congenial to him.

AND WHEREAS, the said party of the first part is desirous of having an interest in the building of a powder plant, and is further desirous of having associated with him in the company to be

formed to promote the said enterprise, and to receive the assistance of the party of the second part,

AND WHEREAS, the party of the second part recognizing the ability, and appreciating the long and faithful service of the said party of the first part is desirous of assisting him in the said enterprise, now, therefore, it is agreed by and between the parties hereto as follows, to wit:

That the party of the first part will cause to be incorporated and organized under the Laws of the 7712
State of Delaware, a corporation to be known as Buckeye Powder Company (or by some other name to be mutually agreed upon) the said Buckeye Powder Company to be incorporated for the purpose of manufacturing powder; to have a capital stock of Seventy-five Thousand Dollars, divided into fifteen hundred shares of the par value of Fifty Dollars each.

The party of the first part agrees to subscribe and pay for fifty-one per cent of the capital stock of the said corporation, and the party of the second part agrees to subscribe and pay for forty-nine 7713
per cent of the said capital stock.

The Charter, or Articles of Association of the said Buckeye Powder Company to contain a provision that the by-laws of the said Company shall be made and altered by the vote of the holders of not less than seventy-five per cent of the capital stock, issued and outstanding.

made—
not altered.

The said Buckeye Powder Company shall build and equip a mill, or mills, for the manufacture of powder at such place, or places, as may be determined to be advantageous by the *unanimous* vote of the Directors of the said Company. The normal capacity of the said mill, or mills, to be twe

not unanimous
—agree now.

7714 *Plaintiff's Exhibit 44*

hundred kegs per diem; the machinery for, and the construction of said mills to be firse-class, and of such kind as may be recommended by Mr. Alfred I. du Pont, or Mr F. Olin, whose recommendation shall be followed, unless it shall appear to the Board of Directors unwise so to do.

It is agreed that the said party of the first part shall devote his entire time and ability to the business of the said Buckeye Powder Company for t
7715 period of ten years, if he shall so long live and be capable of so doing and that during the said period he shall not and will not engage, or be interested, directly or indirectly, in the business of buying, selling or manufacturing powder, dynamite, or other explosives, except in the business of the said Buckeye Powder Company.

It is further agreed that the said party of the first part shall be elected to be the President of the said Buckeye Powder Company, and that he shall receive in full for his services, while holding that
7716 office, the sum of Ten Thousand Dollars per annum to be paid by the said Buckeye Powder Company.

The by-laws of the said Buckeye Powder Company shall provide that the business and affairs of said Company are to be conducted and managed by a Board of Five Directors, two of whom shall be named by the party of the second part.

The salaries of officers of the said Buckeye Powder Company and of employees
No. shall be *fixed* and altered only by the *unanimous* vote of the Directors of said Company.

It is further agreed that the party of the first part shall assign and have transferred to the ——— Company thirty shares of the capital stock of the

said Buckeye Powder Company subscribed for by him as herein provided; the said stock to be held by the said Company subject to the terms and conditions set forth in the receipt to be signed by the said Trust Company in the form hereto annexed and marked "A."

Waived.

It is further agreed that a contract in the form hereto annexed, marked "B," shall be entered into between the said Buckeye Powder Company and the Laflin and Rand Powder Company, said contract to be executed and delivered before the parties hereto shall be required to pay the subscriptions upon the stock of the said Buckeye Powder Company; and the execution and delivery of the said contract to be a condition precedent to the right to collect or enforce said subscription from either of the parties hereto.

7718

Modify "B"

It is further agreed that proceedings shall be immediately taken for the incorporation and organization of the said Buckeye Powder Company and that the said Company when organized shall, with all dispatch, enter into the contract with the Laflin and Rand Powder Company, herein referred to.

7719

IN WITNESS WHEREOF, the party of the first part hath hereunto set his hand and seal, and the party of the second part hath caused these present to be signed by T. C. du Pont, its President, and its corporate seal to be hereunto affixed the day and year first aforesaid.

Signed, Sealed and Delivered
in the presence of
[SEAL]

E. I. DU PONT DE NEMOURS AND CO.,
By
President.

Attest:
Secretary.

7720 **Plaintiff's Exhibit 45 (Government's Exhibit 288a).**

WHEREAS, ROBERT S. WADDELL, of the City of Wilmington, New Castle County and State of Delaware, has assigned and transferred unto the Company, thirty shares of the capital stock of Buckeye Powder Company, a corporation existing under the laws of the State of Delaware.

Now, in consideration of the premises, as well as for and in consideration of the sum of One dol-
7721 lar to this company in hand paid by E. I. du Pont de Nemour's and Company, a corporation existing under the laws of the State of Delaware, the receipt whereof is hereby acknowledged, it is agreed as follows: That the said thirty shares of stock is held in trust for the following purposes, that is to say, until default made, as hereinafter provided, to vote the said stock at all meetings of the stockholders of the Buckeye Powder Company, as it may be directed by the said Robert S. Waddell; provided, however, that the said stock shall be voted
7722 for two directors who shall be named by E. I. du Pont de Nemours and Company; and further provided that the said stock shall not be voted without the consent of the said Robert S. Waddell, or his assigns, and the said E. I. du Pont de Nemours and Company or its assigns, to increase the capital stock of the said Buckeye Powder Company, or to place any lien, or encumbrance upon the property of the said company.

Until default made, as hereinafter provided, the dividends on the said stock, if any, shall be the property of the said Robert S. Waddell, or his assigns.

Should either of the following events happen, this company shall, upon the written request of E. I. du Pont de Nemours and Com-

Not on mere request— Not accepted by R. S. W.

pany, and after it shall be satisfied that the said E. I. du Pont de Nemours and Company has given at least five days' *written notice* to the said Robert S. Waddell, or his assigns of its intention to make the said request, be assigned and transferred absolutely, and free from any trust, unto the said E. I. du Pont de Nemours and Company as its sole and exclusive property.

The events of default, hereinbefore referred to, 7724
shall be the following:

1. If the said Buckeye Powder Company shall sell to any person, or persons, corporation or corporations, any of its product or output, except in accordance with the terms of a certain contract made and entered into on the day of A. D., nineteen hundred and three, by and between the said Buckeye Powder Company and the Laflin and Rand Powder Company, a copy of which contract is hereto annexed, marked "A." 7725

Illegal and voidable by either party.

2. If the said Buckeye Powder Company shall refuse, or neglect to manufacture and supply to the Laflin and Rand Powder Company the powder, as agreed upon in the said contract, marked "A."

3. If the said Robert S. Waddell shall engage in, or be directly, or indirectly interested in the manufacture or sale of explosives, except for the said Buckeye Powder Company, the agreement covering which is contained in a certain contract between the said Robert S. Waddell and the said E. I. du Pont de Nemours and Company bearing date the day of A. D., nineteen hundred and three, a copy of which contract is hereto annexed, marked "B."

7726 *Plaintiff's Exhibit 45*

Upon the termination of the period named in the said two contracts hereto annexed (or if the said contracts shall otherwise be determined) and the faithful compliance with the provisions thereof by the said Buckeye Powder Company, and the said Robert S. Waddell, the said thirty shares of stock shall be transferred and assigned by this company unto the said Robert S. Waddell, his executors, administrators or assigns.

7727 The costs and charges of this company in executing this trust shall be paid equally by the said Robert S. Waddell and the said E. I. du Pont de Nemours and Company.

IN WITNESS WHEREOF, the said Company hath caused these presents to be signed by its president and its corporate seal to be hereunto affixed this day of A. D., nineteen hundred and three.

Signed, Sealed and Delivered

7728 in the presence of,

By

President.

Attest:

Secretary.

Plaintiff's Exhibit 46 (Government's Exhibit 288b). 7729

January 13, 1903.

Wm. S. Hilles, Esq.,
Wilmington, Del.

Dear Sir:—

I have read over the contracts you handed me last evening, and now comment on same. For reference I will describe the papers as 7730

Contract,
Paper A,
Paper B,

Referring to the third paragraph on page 2 of the contract, charter provision that by-laws should be made and altered by vote of holders of 75% of stock, if these are to be made, and there is a disagreement, what would be the effect of doing without by-laws. I can see that by-laws should not be changed, except by such vote. Do you not think this is a stringent clause in regard to "making" 7731 the by-laws.

Fourth paragraph, same page: The company shall build mill or mills at such place or places as may be determined by "unanimous vote of directors;"—if this cannot be determined in advance of organization, it would appear to be unnecessary to organize. The interests of the two parties to the contract are opposed to each other on this proposition. For instance, I would favor the vicinity of Peoria, Ill., for the following reasons:

1. It is a fine distributing point, with excellcellent rail connections reaching all parts of the country.

7732 *Plaintiff's Exhibit 46*

2. Illinois mined during the year 1901, about 27,000,000 tons coal.

Iowa	"	"	5,400,000	"	"
Missouri	"	"	3,800,000	"	"
Ohio	"	"	10,500,000	"	"
			46,700,000		

3. If the vicinity of Peoria or Springfield, Ill. is not occupied by this company, it will be by another and outside interest.

4. It is to my advantage to locate in favor of
7733 conditions ten years hence. The Illinois field has much the brightest future.

5. Peoria, Decatur, Springfield, and Litchfield have five or six railroad connections.

6. West Virginia fields are in parts, hemmed in by mountains. Each locality has a single railroad, and arbitrary rates. (Such mill location would be limited in the area it could reach.

The opposing interest would favor West Virginia for two reasons:

1st. Because it is limited, and would supply a
7734 local business on the C. & O. and N. & W. roads.

2nd. Because Illinois somewhat conflicts with Mooar, Iowa, Mills.

From this it is apparent that friendly conclusion could not be reached by a unanimous vote of the Board of Directors, and there would, therefore, be no location, and no mills.

It would not be prudent to contract for a supply of powder without the possibility of having mills to make it.

In the same paragraph, "The construction of Mills to be First Class," it is possible to get this so high that it would con-

sume the entire capital in fancy machinery, and expensive construction. Good mills could be built without this.

The second paragraph, next page provides that business and affairs of the company are to be conducted and managed by a board of five directors. It seems to me they are to be managed by the contract, and although a director might be chosen for such work, he could do nothing without the consent of the minority. This section, and previous provisions cited appear to conflict. 7736

Third paragraph, this page, "Salaries of officers and Employees shall be fixed and altered only by unanimous vote of Directors;"—under this provision a single member of a board could prevent the hiring of employees to operate the mills, yet they would be under contract for such operation.

Commenting on paper "A," first page, paragraph 4 provides 10 years from the date of this paper. This really means a nine year contract, as the mills could not be built under eight or nine months.

Fifth paragraph, same page, "First party agrees to sell during said period (10 years from date hereof), a definite number of kegs per year, in approximately equal monthly installments. Should not this be more flexible? If the first party cannot sell a keg to others, and disposes of his entire product to the second party, giving an unqualified pledge to keep its contract, this clause seems to severe for rational acceptance. Why not say "not exceeding" a definite quantity. Suppose the first party were enjoined from manufacture? 7737

Second paragraph, next page, reading: "It being understood that the price above-mentioned is based upon average quarterly cost of soda."

7738 *Plaintiff's Exhibit 46*

I think our understand is a little at variance from this. So long as the price of soda remains between $1.50 and $1.90 per 100 lbs., no change is to be made in the price of powder. When it goes above $1.90, or below $1.50, then a change is to be made: one cent per keg for each advance of five cents for soda, above $1.90. When this advance price declines, the price of powder is to be proportionately reduced until soda gets below $1.90, and above $1.50, when the powder price is normal, as pro-
7739 vided in the contract.

Commenting on paper "B," the last paragraph on first page seems to clothe E. I. D. & Co. with judicial powers. When, in the opinion of this company, the contract is broken, the penalty is to be applied, and the forfeiture be made. I have no objection to offer in putting up the security, and in complying with the contract to the letter, yet I should expect to be heard before making this forfeit. As I understand it, all the company desires would be security. If it were a mortgage, it would
7740 have to be foreclosed. Such summary proceeding as is provided for in this case would not suit me.

Paragraph second, page two, if the company should "refuse or neglect" to manufacture a stated quantity as agreed upon in Paper "A," then a forfeiture by summary proceedings would be in order. I do not think this was contemplated as between the parties who have discussed it.

If I sell all my product to one party; limit myself not to sell to others (as in penalty clause No. 1 of Paper "B,") and agree to a forfeiture if I do so; is it probable that I would sit in dleness without the use of a plant? Why is it necessary to penalize me for neglect and to the extent of losing control of a business?

In presenting the proposition which you have

now put in formal shape, I had no intention of buying the majority interest in a business, and of submitting it entirely to the control of the minority, and then give security to the minority that I would comply with its wishes, or forfeit my property on five days notice."

My purpose has been to give old friends and employers the preference in joining me in a business venture which I have decided to make. They, perhaps, have misunderstood me. I am not seeking assistance, but endeavoring to be fair and just to 7742
associates in business.

In making this proposition, the opportunity for a better business future was waived. An independent connection would be preferable to this one, under the restrictions in these papers.

In the main we have agreed. Am very sorry that I cannot acquisce in these technicalities. Kindly submit my views and comments.

I have written Mr. T. C. du Pont that it is necessary for me to be absent to attend to some important matters.

Probably you will desire to let the matter rest 7743
until after the recovery of Mr. T. C. du Pont, and my return to Wilmington, within a week from this date.

Truly yours,

R. S. Waddell.

7744 **Plaintiff's Exhibit 47 (Government's Exhibit 288c).**

January 29, 1903.

Mr. T. C. duPont, Prest.,
Building.

Dear Sir:

Complying with your request that I name definite locations for the proposed powder mills, will say that for the Illinois Mill, Peoria is by far the best
7745 distributing point under present rates and conditions. The competition from Peoria, which has 12 railroads, is sufficient to insure good shipping facilities and favorable rates. There is, however, something to be said in favor of Springfield. Wagon deliveries are practicable from that point, while, in time, if the trade developed the necessity for it, favorable freight rates would be made. I would not object to either of these places.

Litchfield, also, offers some advantages, and stands on par with Springfield as a distributing point to other localities.

7746 Something would depend on the ability to secure a definite site, and this can only be settled by viewing the surroundings, which I would like to do immediately after February 1st.

As to the West Virginia Mills. As the Purchasing Company contracts to take the entire output of the mills for a term of years, I presume I should offer no objections, yet, knowing the situation, and desiring that the Purchasing Company should not enter into a contract without understanding the conditions, I would express an opinion on this subject.

West Virginia Trade is strictly FFF. A mill located in that territory will produce approximately 40% FFF Powder, the remainder FF, F, C, and

 7747

CCC. The Purchasing Company would, therefore, have 60% of the powder, of course grain, that would have to be market in other sections of the country. If there were two mills, and they were located in Kanawha and Pocohantas Districts, 60% of the powder would have to be shipped out at a high freight rate, in order to find a market. If on the other hand, the Purchasing Company desired to have the Manufacturing Company break down the coarse grains, and increase its output of FFF, this would treble the expenses of wheeling, pressing, and graining; at the same time reducing the output of the mills fully 40%, or in other words, increase the cost for labor and mill work, and exclusive of materials, fully 40%. The Operating Department should be able to furnish you the cost of materials, and the cost of glazing. Deduct this cost from the total cost of manufacture ready for packing in the kegs, and you can readily determine the extra cost involved by such operation. The Manufacturing Company, of course, could not undertake to bear this extra expense, for it would absorb all the profits of the business, and it would merely be working for the Purchasing Company. 7748 7749

There would be a little saving of freight by locating near the centre of Kanawha and also in the centre of the Pocohantas Fields. This would be more than overcome by the added expense of manufacturing FFF. I would be willing to locate a mill in each of these places, the Purchasing Company to take the entire output as it runs from day to day, or, if it would agree to bear the added expense of the manufacture of strictly FFF powder.

After studying the situation very carefully, I am of the opinion that for the good of all concerned, it would be very much better to locate an 800 keg mill in Illinois, for the general relief of that

7750 *Plaintiff's Exhibit 47*

district, and to locate a 400 keg mill near Kenova, the latter to make as much FFF powder as would be possible, so as to relieve the Purchasing Company of the marketing of an excess quantity of the coarser grains. I believe a 400 keg mill, with three wheels, would be large enough for that location; placing five wheels at the Illinois plant.

As a better proposition, and one more favorable both for your interests, and my own, I would recommend the following:

7751 Locate an 800 keg mill in Illinois, and a 400 keg mill in the Fort Smith, Indian Territory district, to be operated by the Buckeye Powder Company. Then let the Phoenix Powder Mnfg. Company move its present plant at Kenova to a more favorable situation in that locality, to be owned and controlled by its present stockholders. If all my expenses were paid, in the care of such a mill, I would be willing to look after its operation, conducting the business without compensation. The total cost would probably not exceed one thousand

7752 dollars per year, and the Cincinnati office could market the output.

I have made a very careful study of the trade, the requirements of the business, the future prospects, and of the situation in all its relations to Associates, and believe this latter suggestion to be the better one for the DuPont interests.

The present volume of business in the Indian Territory and Arkansas Fields is about 190,000 kegs per year. This will increase to a maximum of 300,000, which could be tributary to the plan I suggest, and to the one contemplated by Mr. Olin. I would recommend that you have two strings to your bow in that district.

Awaiting your pleasure in the matter, I remain,

Truly yours,

Plaintiff's Exhibit 48 (Government's Exhibit 288d). 7753

February 2, '03.

Mr. T. C. duPont, President,
Office.

Dear Sir:

Your counter-proposition to locate two mills for Buckeye Powder Company, one at Birmingham, Ala.; the other at a point in Indian Territory, or 7754
at Pueblo, Colo., has been carefully considered, and does not impress me favorably for several reasons:

First, The freight rates on raw material are excessive.

Second, Transportation facilities are limited, and the trade of such mills will be strictly local. The business of these mills would always be menaced by probable combinations of operators in building opposition mills.

7755

Third, Either place would be undesirable as a home.

During the past six weeks our efforts to agree have proved futile, and it seems useless to longer continue the negotiations.

I wish to decide a definite course at the beginning of this month, and that I may be free to take up other lines of work, I request that you kindly designate some one to whom I may turn over pending business.

Truly yours,

General Sales Agent.

7756 **Plaintiff's Exhibit 49 (Government's Exhibit 788e).**

E. I. DU PONT DE NEMOURS & Co.,
Wilmington, Delaware.

President's Office.

February 2, 1903.

Mr. R. S. Waddell,
Building.

Dear Sir:—

I am in receipt of your letter of even date, the contents of which have been noted. Since in the
7757 last paragraph you make a definite request to be relieved of the duties of your present position there would appear to be nothing for me to say in reply except that I will arrange to relieve you at whatever time will best suit your convenience on or before February 9, 1903.

Regretting that our recent efforts along the lines of co-operation appear to have been futile, I remain,

Yours truly,
(Signed) T. C. duPont,
Pt.

7758

Plaintiff's Exhibit 50 (Government's Exhibit 288f).

February 2, '03.

Mr. T. C. duPont,
Office.

Dear Sir.

Your favor this date received. As this is the beginning of the month, I would prefer to discontinue service at once, and will thank you if you will kindly have some one relieve me of duty to-day.

Truly yours,

General Sales Agent.

Plaintiff's Exhibit 51 (Government's Exhibit 288g). 7759

E. I. DU PONT DE NEMOURS & Co.,
Wilmington, Delaware.
President's Office.

February 2, 1903.

Mr. R. S. Waddell,
Building.

Dear Sir:—

I have your letter of February 2nd. If Mr. Eugene du Pont returns this evening he will relieve you. If not he will do this the first thing to-morrow morning. 7760

Yours truly,
(Signed) T. C. du Pont,
President.

Plaintiff's Exhibit P-162.

THIS CONTRACT entered into this 16th day of November, 1912, by and between the E. I. DU PONT DE NEMOURS POWDER COMPANY, a corporation of the State of New Jersey, party of the first part, and DOOLEY BROTHERS, PEORIA, ILLINOIS, party of the second part. 7761

(1) WITNESSETH: That the party of the first part, hereby sells and the party of the second part hereby purchases all of the explosives and blasting supplies needed, required or used by the party of the second part during the period of this contract, for use or sale in the PEORIA COAL MINING DISTRICT, at the following prices:

"B" BLASTING POWDER

CARLOAD LOTS: F.O.B. Peoria, Illinois, direct sale to the party of the second part for local

7762 *Plaintiff's Exhibit P-162*

sale and distribution by the party of the second part. 800 kegs or more, one shipment, $1.15 per keg; 400 kegs and less than 800 kegs, one shipment, $1.17½ per keg. Less Five cents (5c) per keg commission to party of second part.

CARLOAD. SHIPMENTS: Made by the party of the first part direct to customers of the party of the second part in the Peoria Coal Mining District, f.o.b. nearest Railroad Station. 800 kegs or
7763 more, one shipment, $1.15 per keg; 400 kegs and less than 800 kegs, one shipment, $1.17½ per keg. Less Five cents (5c) per keg commission to party of the second part.

Any other explosives or blasting supplies not specified in this contract to be furnished at current prices which are charged by the du Pont Company in the district in which the explosives or blasting supplies are to be used.

The following conditions are mutually accepted:

7764 (2) The prices herein are based on present freight rates, and present minimum carload quantities, but in case the present freight rates or present minimum carload quantites are increased or decreased during the existence of this contract, the amount of such increase or decrease shall be added to or deducted from the above prices.

The prices herein are also based on present method of packing and transporting powder, but in case the present method of packing or transporting powder is prevented by law or Railway Association regulations during the existence of this contract, then in that event this contract may, at the election of the party of the first part, be terminated.

 7765

(3) Terms: 30 days Net, or 2% discount if paid within 10 days from date of invoice.

Party of the second part to make carload sales only to such customers as may be approved by party of the first part.

Sales of less than carload lots by party of the second part are to be confined to Peoria County, Illinois, and to the Pekin Mining District in Tazewell County, Illinois, unless special permission be first secured from party of the first part.

7766

(4) The party of the first part is not to be responsible for delays caused by strikes, accidents or causes beyond its control.

(5) This contract to go into effect on the 1st day of January, 1913, and continue in force until the 31st day of December, 1913, and thereafter from year to year unless written notice is mailed to the address of either party by the other sixty (60) days prior to the 31st day of December of any year, in which event upon the arrival of such date the contract is to be terminated. 7767

(6) This contract does not become binding until accepted by the E. I. du Pont de Nemours Powder Company, at its main office at Wilmington, Delaware.

E. I. DU PONT DE NEMOURS POWDER COMPANY,
By P. H. Donnelly,
Salesman, &c.
Dooley Brothers,
By J. B. Dooley, President.

Accepted at Wilmington, Del., Nov. 21, 1912.

E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Wm. Coyne,
Director of Sales.

7768 **Plaintiff's Exhibit 732.**

This contract entered into this 1st day of August, 1906, by and between the E. I. du Pont Company, a corporation of Wilmington, Delaware, party of the first part, and the Clark Coal & Coke Company, Peoria, Illinois, party of the second part, witnesseth:

First, that the party of the first part hereby sells, and the party of the second part hereby purchases all the blasting powder required by the party of the second part for one year's boring operations of the Clark Coal & Coke Company, Peoria, Illi-
7769 nois, at the price of one dollar per keg of twenty-five (25) pounds, each, delivered f. o. b. at the points aforesaid.

Second, it is agreed that the powder furnished under this contract is for consumption of the second party only, and not for sale except to its own miners and employees, and that violation of this clause gives the party of the first part the option of cancellation of this contract.

Third, deliveries to be made in carloads of not less than eight hundred (800) kegs, terms 60 days,
7770 or two per cent (2%) discount for cash within ten days of date of invoice.

Fourth, party of the first part is not to be responsible for delays caused by strikes, accidents, or causes beyond its control.

Fifth, this contract does not become effective until accepted by the E. I. du Pont Company at Wilmington, Delaware.

E. I. DU PONT COMPANY,
By Dooley Bros., Agents,
Clark Coal & Coke Co.,
Horace Clark, Secy.

Accepted at Wilmington, Del.
July 23, 1906.
E. I. du Pont Co.
(Signed) Eugene du Pont,
G. S. A.

Plaintiff's Exhibit 740.

7771

THIS CONTRACT entered into this Eleventh DU PONT DE NEMOURS POWDER COMPANY, a corporation of the State of New Jersey, party of the first part, and Dooley Brothers, Peoria, Illinois, party of the second part.

(1) WITNESSETH: That the party of the first part hereby sells and the party of the second part hereby purchases all of the Black Blasting Powder required by the party of the second part, during the period of this contract, for use of Clark Coal & Coke Company, Peoria, Illinois, at the following prices:

7772

CARLOADS: 800 kegs, or over $1.05 per keg, delivered nearest railroad station. Less commission of 5c. per keg.

The above prices are based on present freight rates, and present minimum carload quantity, but in case the present freight rates or present minimum carload quantity are increased or decreased during the existence of this contract, the amount of such increase or decrease shall be added to or deducted from the above prices.

7773

The above prices are also based on present method of packing and transporting powder, but in case the present method of packing and transporting powder is prevented by law, or railway association regulations during the existence of this contract, then in that event this contract, may at the election of the party of the first par, be terminated.

The following conditions are mutually accepted:

(2) Terms are sixty (60) days, or two per cent (2%) in ten (10) days from date of invoice.

7774 *Plaintiff's Exhibit 740*

(3) It is agreed that explosives furnished under this contract are for consumption of the party of the second part only and not for sale except to its own sub-contractors or employes and that a violation of this clause gives the party of the first part the option of cancellation of this contract.

(4) The party of the first part is not to be responsible for delays caused by strikes, accidents or causes beyond its control.

7775

(5) This contract to go into effect on first day of January, 1908, and continue in force until first day of January, 1909, and thereafter from year to year unless written notice is mailed to the address of either party, by the other, sixty (60) days prior to first day of January of any year, in which event upon the arrival of such date the contract is to be terminated.

(6) This contract does not become binding until accepted by the E. I. DU PONT DE NEMOURS POW-
7776 DER COMPANY, at its main office at Wilmington, Delaware.

E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Dale Bumstead.

DOOLEY BROS.
By J. B. Dooley.

Accepted at Wilmington, Del.,
Nov. 26, 1907.
E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Wm. Coyne.

Plaintiff's Exhibit 740, 741 7777

Following letter is attached to contract (Ex. 740):

Wilmington, Del., December 3, 1908.

Mr. Alexis I. du Pont, Secty.,
Building.

Dear Sir: File SD-4733

Please note that due notice has been given of our desire to discontinue our self-renewing contract No. 762, with the Clark Coal & Coke Company, Peoria, Ills., running from January 1, 1908, to January 1, 1909. Kindly acknowledge receipt of this letter. 7778

Your very truly,

Director of Sales.

Plaintiff's Exhibit 741.

THIS CONTRACT entered into this 25th day of November, 1907, by and between the E. I. DU PONT DE NEMOURS POWDER COMPANY, a corporation of the State of New Jersey, party of the first part, and Dooley Brothers, Peoria, Illinois, party of the second part. 7779

(1) WITNESSETH: That the party of the first part hereby sells and the party of the second part hereby purchases all of the Blasting Powder required by the party of the second part, during the period of this contract, for use of Howarth & Taylor, Edwards, Illinois, at the following prices:

CARLOADS: 800 kegs, or over, 1.05 per keg, delivered nearest Railroad Station; 400 kegs, or less than 800 kegs, $1.07½ per keg, delivered near-

7780 *Plaintiff's Exhibit 741*

est Railroad Station. 5c per keg commission to Dooley Brothers.

The above prices are based on present freight rates, and present minimum carload quantity, but in case the present freight rates or present minimum carload quantity are increased or decreased during the existence of this contract, the amount of such increase or decrease shall be added to or deducted from the above prices.

7781 The above prices are also based on present method of packing and transporting powder, but in case the present method of packing and transporting powder is prevented by law, or Railway Association regulations during the existence of this contract, then in that event this contract, may at the election of the party of the first part, be terminated.

The following conditions are mutually accepted:

(2) TERMS ARE :

7782 60 days or 2% for cash within 10 days from date of invoice.

(3) It is agreed that explosives furnished under this contract are for consumption of the party of the second part only and not for sale except to its own sub-contractors or employes and that a violation of this clause gives the party of the first part the option of cancellation of this contract.

(4) The party of the first part is not to be responsible for delays caused by strikes, accidents or causes beyond its control.

(5) This contract to go into effect on 25th day of November, 1907, and continue in force until 25th

 7783

day of November, 1908, and thereafter from year to year unless written notice is mailed to the address of either party, by the other, sixty (60) days prior to 25th day of November of any year, in which event upon the arrival of such date the contract is to be terminated.

(6) This contract does not become binding until accepted by the E. I. DU PONT DE NEMOURS POWDER COMPANY, at its main office at Wilmington, Delaware. 7784

E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Dale Bumstead.

Dooley Bros.
By J. B. Dooley.

ACCEPTED at Wilmington, Del.,
Dec. 31, 1907.
E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Wm. Coyne.

Following letter is attached to contract (Exhibit 741) and marked Plaintiff's Exhibit 742: 7785

Wilmington, Del., December 3, 1908.

Mr. Alexis I. du Pont, Secty.,
Building.

Dear Sir:— File SD-8177.

Please note that our self-renewing contract No. 964, with Howarth & Taylor, Edwards, Ills., running from November 25, 1907 to November 25, 1908, has been discontinued, and is no longer in effect.

Kindly acknowledge receipt of this letter.

Yours very truly,
Director of Sales.

7786 *Plaintiff's Exhibits 741, 745*

Also the following letter marked Plaintiff's Exhibit 743:

Wilmington, Del., July 30, 1908.

Mr. Dale Bumstead, Mgr.,
Chicago.

Dear Sir:— File SD-8177.

Our contract with Howarth & Taylor, Edwards, Ills., which requires a notice of 60 days to discontinue, will expire Nov. 25, next. Please advise them that it is not our desire to continue this con-
7787 tract; and state on the enclosed sheet the date you notify them.

Yours very truly,

A. D. S.

Plaintiff's Exhibit 745.

THIS CONTRACT entered into this 27th day of November, 1907, by and between the E. I. DU PONT DE NEMOURS POWDER COMPANY, a corporation of the State of New Jersey, party of the first part,
7788 and Dooley Brothers, Peoria, Illinois, party of the second part.

(1). WITNESSETH: That the party of the first part hereby sells and the party of the second part hereby purchases all of the Blasting Powder required by the party of the second part, during the period of this contract, for use of Sholl Brothers' Mine, Peoria, Illinois, at the following prices:

CARLOADS: 800 kegs, or over, $1.05 per keg, delivered nearest Railroad Station. 5c per keg commission to Dooley Brothers.

The above prices are based on present freight rates, and present minimum carload quantity, but

Plaintiff's Exhibit 745 7789

in case the present freight rates or present minimum carload quantity are increased or decreased during the existence of this contract, the amount of such increase or decrease shall be added to or deducted from the above prices.

The above prices are also based on present method of packing and transporting powder, but in case the present method of packing and transporting powder is prevented by law, or Railway Association regulations during the existence of this contract, then in that event this contract, may at the 7790
election of the party of the first part, be terminated.

The following conditions are mutually accepted:

(2) TERMS ARE 60 days or 2% for cash within 10 days from date of invoice.

(3) It is agreed that explosives furnished under this contract are for consumption of the party of the second part only and not for sale except to its own sub-contractors or employes and that a violation of this clause gives the party of the first part 7791
the option of cancellation of this contract..

(4) The party of the first part is not to be responsible for delays caused by strikes, accidents or causes beyond its control.

(5) This contract to go into effect on 27th day of November, 1907, and continue in force until 27th day of November, 1908, and thereafter from year to year unless written notice is mailed to the address of either party, by the other, sixty (60) days prior to 27th day of November of any year, in which event upon the arrival of such date the contract is to be terminated.

(6) This contract does not become binding until

accepted by the E. I. DU PONT DE NEMOURS POWDER COMPANY, at its main office at Wilmington, Delaware.

E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Dale Blumstead.

DOOLEY BROS.
By J. B. Dooley.

ACCEPTED at Wilmington, Del.,
7793 Dec. 31, 1907.
E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Wm. Coyne.

Following letter is attached to contract (Ex. 745) and marked Plff.'s Ex. 746.

Wilmington, Del., July 30, 1908.

Mr. Dale Bumstead, Mgr.,
Chicago, Ills.

Dear Sir: File SD-9149.

Our contract with Sholl Bros., Peoria, Ills., which requires a notice of 60 days to discontinue, will
7794 expire Nov. 27 next. Please advise them at once that it is not our desire to continue this contract, and state on enclosed sheet the date you notify them.

Yours very truly,

A. D. S.

Plaintiff's Exhibit 762.

THIS. CONTRACT entered into this 30th day of November, 1907, by and between the E. I. DU PONT DE NEMOURS POWDER COMPANY, a corporation of the State of New Jersey, party of the first part, and Dooley Brothers, Peoria, Illinois, party of the second part.

Plaintiff's Exhibit 762 7795

(1) WITNESSETH: That the party of the first part hereby sells and the party of the second part hereby purchases all of the Blasting Powder required by the party of the second part, during the period of this contract, for use of Applegate & Lewis Coal Company, Cuba, Illinois, at the following prices:

CARLOADS: 800 kegs or over, $1.05 per keg, delivered nearest railroad station; 5c per keg commission to Dooley Brothers. 7796

The above prices are based on present freight rates, and present minimum carload quantity, but in case the present freight rates or present minimum carload quantity are increased or decreased during the existence of this contract, the amount of such increase or decrease shall be added to or deducted from the above prices.

The above prices are also based on present method of packing and transporting powder, but in case the present method of packing and transporting powder is prevented by law, or railway 7797 association regulations during the existence of this contract, then in that event this contract, may at the election of the party of the first part, be terminated.

The following conditions are mutually accepted:

(2) TERMS ARE—60 days or 2% for cash within 10 days from date of invoice.

(3) It is agreed that explosives furnished under this contract are for consumption of the party of the second part only and not for sale except to its own sub-contractors or employes and that a violation of this clause gives the party of the first part the option of cancellation of this contract.

7798 *Plaintiff's Exhibit 762*

(4) The party of the first part is not to be responsible for delays caused by strikes, accidents or causes beyond its control.

(5) This contract to go into effect on 30th day of November, 1907, and continue in force until 30th day of November, 1908, and thereafter from year to year unless written notice is mailed to the address of either party, by the other, sixty (60) days prior to 30th day of November of any year,
7799 in which event upon the arrival of such date the contract is to be terminated.

(6) This contract does not become binding until accepted by the E. I. DU PONT DE NEMOURS POWDER COMPANY, at its main office at Wilmington, Delaware.

E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Dale Bumstead.

DOOLEY BROS.
By J. B. Dooley.

7800 ACCEPTED at Wilmington, Del.,
Dec. 31, 1907.
E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Wm. Coyne.

Following letter attached to contract (Exhibit 762) and marked Plaintiff's Exhibit 763:

Wilmington, Del., July 30, 1908.

Mr. Dale Bumstead, Mgr.,
Chicago, Ill.

Dear Sir:—

File SD-6816.

Our contract with the Applegate & Lewis Co., Peoria, Ill., which requires notice of 60 days to discontinue, will expire November 30th, next. Please advise them at once that it is not our desire

to continue this contract, and state on the enclosed sheet the date you notify them.

Very truly yours,

A. D. S.

Plaintiff's Exhibit 1247-S, is a contract dated January 20th, 1908, identical in all respects with Plaintiff's Exhibit 762, except that the customer to be supplied is Champion Coal Company, Pekin, Illinois, and the prices for blasting powder are as follows: 7802

Carload lots: 800 kegs or over $1.10 per keg f. o. b. cars, Pekin, Illinois; 400 kegs, or over, $1.12½ per keg f. o. b. cars, Pekin, Illinois. Five cents (5c) per keg, commission to Dooley Bros. This contract goes into effect Jan. 20, 1908, and continues in force until Jan. 20, 1909.

Plaintiff's Exhibit 736, is a contract dated November 11, 1907, identical in all respects with Plaintiff's Exhibit 762, except that the customer to be supplied is Collier Co-operative Coal Company, Peoria, Illinois, and the prices for blasting powder 7803 are as follows:

"Carloads: 800 kegs, or over $1.05 per keg, delivered nearest railroad station. Less commission of 5c per keg."

This contract goes into effect Nov. 11, 1907, and continues in force until Nov. 11, 1908.

The following letters are attached to contract (Exhibit 736) and marked Plaintiff's Exhibit 737:

Wilmington, Del., December 3, 1908.

Mr. Alexis I. du Pont, Secty.,

Building,

Dear Sir:— File SD-5149.

Please note that our self-renewing contract No. 761, with the Collier Co-operative Coal Co., Peoria,

7804 *Plaintiff's Exhibit 762*

Ill., running from November 11, 1907, to November 11, 1908, has been discontinued, and is no longer in effect.

Kindly acknowledge receipt of this letter.

Yours very truly,

Director of Sales.

Wilmington, Del., July 30, 1908.

Mr. Dale Bumstead, Mgr.,

Chicago, Ill.

7805 Dear Sir:— File SD-5149.

Our contract with the Collier Co-operative Coal Co., Peoria, Ills., which requires a notice of 60 days to discontinue, will expire Nov. 11, next. Please advise them that it is not our desire to renew this contract, and state on enclosed sheet the date you notify them.

Yours very truly, A. D. S.

Plaintiff's Exhibit 1247-D, is a contract dated November 29, 1907, identical in all respects with Plaintiff's Exhibit 762, except that the customer
7806 to be supplied is Eastern Coal Company, Peoria, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs, or over $1.05 per keg, delivered at nearest railroad station; 5c per keg commission to Dooley Brothers."

This contract goes into effect Nov. 29, 1907, and continues in force until Nov. 29, 1908.

Plaintiff's Exhibit 1247-E, is a contract dated November 29, 1907, identical in all respects with Plaintiff's Exhibit 762, except that the customer to be supplied is Eagle Mining Company, Canton, Illinois, and the prices for blasting powder are as follows:

Carloads: 800 kegs, or over $1.05 per keg, de-

livered nearest railroad station; 5c per keg commission to Dooley Brothers."

This contract goes into effect Jan. 1, 1908, and continues in force until Jan. 1, 1908.

Plaintiff's Exhibit 759, is a contract dated November 30, 1907, identical in all respects with Plaintiff's Exhibit 762, except that the customer to be supplied is W. E. Foley, Mapleton, Illinois, and the prices for blasting powder are as follows:

7808 "Carloads: 800 kegs, or over, $1.05 per keg, delivered nearest railroad station; 400 kegs, or less than 800 kegs, $1.07½ per keg, delivered nearest railroad station; 5c per keg commission to Dooley Brothers."

This contract goes into effect Nov. 30, 1907, and continues in force until Nov. 30, 1908.

Following letter attached to contract (Exhibit 759) and marked Plaintiff's Exhibit 760:

Wilmington, Del., July 30, 1908.

7809 Mr. Dale Bumstead, Mgr.,
Chicago, Ills.

Dear Sir:— File SD-9151.

Our contract with W. E. Foley, Mapleton, Ills., which requires a notice of 60 days to discontinue, will expire November 30th next. Please advise them that it is not our desire to continue this contract, and state on the enclosed sheet the date you notify them.

Yours very truly, A. D. S.

Plaintiff's Exhibit 1247-H, is a contract dated November 29th, 1907, identical in all respects with Plaintiff's Exhibit 762, except that the customer to be supplied is Harry C. Hill, Fairview, Illinois, subdivision (3) is stricken out, and the prices for blasting powder are as follows:

7810 *Plaintiff's Exhibit 762*

Carloads: 800 kegs, or over, $1.05 per keg, delivered nearest Railroad Station; 400 kegs, or less than 800 kegs, $1.07½ per keg, delivered nearest Railroad Station. 5c per keg commission to Dooley Brothers."

This contract goes into effect Nov. 29, 1907, and continues in force until Nov. 29, 1908.

Plaintiff's Exhibit 1247-W, is a contract dated January 22nd, 1908, identical in all respects with
7811 Plaintiff's Exhibit 762, except that the customer to be supplied is Mutual Coal Company, Mt. Pulaski, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs, $1.10 per keg f.o.b. nearest Railway Station; 400 kegs, $1.12½ per keg, f.o.b. nearest Railroad Station. 5c per keg commission to Dooley Brothers."

This contract goes into effect Jan. 22, 1908, and continues in force until Jan. 22, 1909.

7812 Plaintiff's Exhibit 1247-I, is a contract dated November 27th, 1907, identical in all respects with Plaintiff's Exhibit 762, except that the customer to be supplied is Phoenix Coal Company, Peoria, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs or over, $1.05 per keg, delivered nearest Railroad Station. 5c per keg commission to Dooley Brothers."

This contract goes into effect Nov. 27, 1907, and continues until Nov. 27, 1908.

Plaintiff's Exhibit 765, is a contract dated November 30th, 1907, identical in all respects with Plaintiff's Exhibit 762, except that the customer to be supplied is Simmons Coal Company, Canton,

Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs, or over, $1.05 per keg, delivered nearest Railroad Station. 5c per keg commission to Dooley Brothers."

This contract goes into effect on Nov. 30, 1907, and continues in force until Nov. 30, 1908.

Following letter attached to contract (Ex. 765) and marked Plff.'s Ex. 766.

Wilmington, Del., July 30, 1908. 7814

Mr. Dale Bumstead, Mgr.,
Chicago, Ills.

Dear Sir: File SD-9150

Our contract with the Simmons Coal Co., Canton, Ills., which requires a notice of 60 days to discontinue, will expire November 30th next. Please advise them that it is not our desire to continue this contract, and state on enclosed sheet the date you notify them.

Yours very truly, A. D. S.

Plaintiff's Exhibit 748, is a contract dated November 29th, 1908, identical in all respects with Plaintiff's Exhibit 762, except that the customer to be supplied is Spoon River Coal Company, Ellisville, Illinois, and the prices for blasting powder are as follows: 7815

"Carloads: 800 kegs, or over, $1.05 per keg, delivered nearest Railroad Station; 400 kegs, or less than 800 kegs, $1.07½ per keg, delivered nearest Railroad Station. 5c per keg commission to Dooley Brothers."

This contract goes into effect Nov. 29, 1907, and continues in force until Nov. 29, 1908.

Following letter attached to contract (Ex. 748) and marked Plff.'s Ex. 749.

7816 *Plaintiff's Exhibit 762*

Wilmington, Del., July 30, 1906.

Mr. Dale Bumstead, Mgr.,
Chicago.

Dear Sir: File SD-9433

Our contract with the Spoon River Coal Company, Ellisville, Ills., which requires a notice of 60 days to discontinue, will expire November 29th. Please advise them that it is not our desire to continue this contract, and state on enclosed sheet the date you notify them.

7817

Yours very truly, A. D. S.

Plaintiff's Exhibit 1247-M, is a contract dated November 27th, 1907, identical in all respects with Plaintiff's Exhibit 762, except that the customer to be supplied is Treasure Coal Company, Bartonville, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs or over, One Dollar-five ($1.05) per keg, delivered nearest Railroad Station. Less commission of five cents (5c) per keg."

7818 This contract goes into effect Nov. 27, 1907, and continues in force until Nov. 27, 1908.

Plaintiff's Exhibit 1247-N, contract dated November 27th, 1907, identical in all respects with Plaintiff's Exhibit 762, except that the customer to be supplied is George Vicary, Peoria, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs, or over, $1.05 per keg, delivered nearest Railroad Station; 400 kegs, or over, $1.07½ per keg, delivered nearest Railroad Station. Five cents (5c) per keg commission to Dooley Brothers."

This contract goes into effect Nov. 27, 1907, and continues in force until Nov. 27, 1908.

Plaintiff's Exhibit 762 7819

Plaintiff's Exhibit 751, is a contract dated November 29th, 1907, identical in all respects with Plaintiff's Exhibit 762, except that the customer to be supplied is I. Wantling & Company, Peoria, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs, or over, $1.05 per keg, delivered nearest Railroad Station; 400 kegs, or over, $1.07½ per keg, delivered nearest Railroad Station. Five cents (5c) per keg commission to Dooley Brothers." 7820

This contract goes into effect Nov. 29, 1907, and continues in force until Nov. 29, 1908.

Following letters attached to contract (Ex. 751) and marked Plff.'s Ex. 752.

Wilmington, Del., December 3, 1908.

Mr. Alexis I. du Pont, Secty.,
Building.

Dear Sir: File SD-7434

Please note that our self-renewing contract #916, with I. Wantling & Co., running from November 29, 1907, to November 29, 1908, has been discontinued, and is no longer in effect. 7821

Kindly acknowledge receipt of this letter.

Yours very truly,

.....,
Director of Sales.

Also following letter marked Plff.'s Ex. 753.

Wilmington, Del., July 30, 1908.

Mr. Dale Bumstead, Mgr.,
Chicago, Ill.

Dear Sir: File SD-7434

Our contract with I. Wantling & Co., Elmwood, Ills., which requires a notice of 60 days to discontinue, will expire November 29th next. Please

7822 *Plaintiff's Exhibit 762*

advise them at once that it is not our desire to continue this contract, and state on the enclosed sheet the date you notify them.

Yours very truly, A. D. S.

Plaintiff's Exhibit 768, is a contract dated November 30th, 1907, identical in all respects with Plaintiff's Exhibit 762, except that the customer to be supplied is Winters Coal Company, Peoria, Illinois, and the prices for blasting powder are as
7823 follows:

"Carloads: 800 kegs or over, $1.05 per keg, delivered nearest Railroad Station. 5c per keg commission to Dooley Brothers."

This contract goes into effect Nov. 30, 1907, and continues in force until Nov. 30, 1908.

Following letter attached to contract (Ex. 768) and marked Plff.'s Ex. 769.

Wilmington, Del., July 30, 1908.

Mr. Dale Bumstead, Mgr.,
Chicago, Ill.

7824 Dear Sir:

File SD-6162: Our contract with the Winters Coal Co., Peoria, Ill., which requires notice of 60 days to discontinue, will expire November 30th, next. Please advise them at once that it is not our desire to continue this contract, and state on the enclosed sheet the date you notify them.

Very truly yours, A. D. S.

Plaintiff's Exhibit 1247-P, is a contract dated November 30th, 1907, identical in all respects with Plaintiff's Exhibit 762, except that the customer to be supplied is Wolschlag Co-operative Coal Company, Peoria, Illinois.

"Carloads: 800 kegs, or over, $1.05 per keg, car-

loads delivered nearest Railroad Station. 5c per keg commission to Dooley Brothers."

This contract goes into effect Nov. 30, 1907, and continues in force until Nov. 30, 1908.

Plaintiff's Exhibit 785.

THIS contract MADE between E. I. du Pont Company, a corporation of the State of Delaware, 7826 party of the first part and the Great Northern Fuel Company, party of the second part.

WITNESSETH: That party of the grst part hereby sells and party of the second part buys, all the black blasting powder, in kegs of 25 lbs. each, required for the use in the mines owned or controlled by second party, as noted below, for the period of one year from this date, at current car load price established by party of the first part, at location named, at the time of receipt of order, the present car load price being $1.45 per keg. 7827

The following conditions are mutually accepted:

(a) First party agrees to allow second party a rebate of 40 cents per keg on powder purchased under this contract.

(b) First party agrees to allow second party the actual car load freight charges from shipping to delivery points.

(c) Terms are sixty days or 2% discount for cash if remitted within ten days from date of invoice.

7828 *Plaintiff's Exhibit 785*

(d) Second party agrees to buy from first party in car load lots of 800 kegs of 500 lbs. each, all the black blasting powder required by it for the following mines.

Name.	Location.
Great Northern Fuel Company,	Novinger, Mo.

or any other mines that may be acquired by the second party, in the same district, during the time of this contract.

7829

(e) It is agreed that powder furnished under this contract is for consumption of the second party only and not for sale except to its miners and employees. It is agreed that a violation of this clause gives to party of first part option of cancellation of this contract.

(f) The first party may furnish and the second party will accept under this contract, powder of any standard brand, make and quality, equal to du Pont brand.

7830

(g) The first party is not to be responsible for delays caused by strikes, accidents or other causes beyond its control.

(h) The terms and conditions, as well as the existence of this contract to be confidential.

Dated at St. Louis, Mo.,
Nov. 1, 1905.

E. I. DU PONT COMPANY,
(Signed) by Eugene du Pont,
G. S. A.

(Signed) GREAT NORTHERN FUEL COMPANY,
By W. S. McCaull, Pres."

Plaintiff's Exhibit 787. 7831

"THIS CONTRACT entered into this 5th day of November, 1906, by and between E. I. du Pont Company, a corporation of Wilmington, Delaware, party of the first part, and GREAT NORTHERN FUEL CO., of Novinger, Mo., party of the second part.

(1) WITNESSETH: That the party of the first part hereby sells and the party of the second part hereby purchases all of the blasting powder required by the party of the second part for one year, at the following operations: 7832

Name.	Location.
Great Northern Fuel Co.	Novinger, Mo.

at the price of $1.05 per keg of twenty-five (25) pounds each, delivered f. o. b. the points aforesaid.

(2) It is agreed that powder furnished under this contract is for consumption of the second party only, and not for sale, except to its own miners or employees and that a violation of this clause gives the party of the first part the option of cancellation 7833 of this contract.

(3) Deliveries to be made in carloads of not less than 800 kegs.

(4) The party of the first part is not to be responsible for delays caused by strikes, accidents or causes beyond its control.

(5) This contract does not become effective until accepted by the E. I. du Pont Company, at Wilmington, Delaware.

(6) Terms are sixty days or 2% discount for

7834 *Plaintiff's Exhibits* 787, 788

cash if remitted within ten days from date of invoice.

E. I. DU PONT COMPANY,
(Sgd) Irene du Pont, Treas.
GREAT NORTHERN FUEL CO.,
By I. B. Grant,
Gen'l Manager."

ACCEPTED at Wilmington, Del.,
November 5, 1906.

7835

Plaintiff's Exhibit 788.

THIS CONTRACT entered into this 5th day of November, 1907, by and between the E. I. du Pont de Nemours Powder Company, a corporation of the State of New Jersey, party of the first part, and Great Northern Fuel Company, Novinger, Missouri, party of the second part.

(1) WITNESSETH: That the party of the first part hereby sells and the party of the sec-
7836 ond part hereby purchases all of the black blasting powder required by the party of the second part during the period of this contract for use in their mines at Novinger, Mo., at the following prices:

$1.05 per keg f. o. b. Novinger, Mo., carloads of 800 kegs, of twenty-five (25) pounds each.

(1-a*) The above price is based on and shall apply during the continuance of present freight rates and minimum carload quantity. In case present freight rates or minimum carload quantity are increased or decreased during the term of this contract, the above price shall be increased or decreased accordingly.

The following conditions are mutually accepted:

(2*) Terms are sixty (60) days or two per cent

(2%) discount for cash is remitted ten (10) days from date of invoice.

(3) It is agreed that explosives furnished under this contract are for consumption of the party of the second part only and not for sale except to its own sub-contractors or employes and that a violation of this clause gives the party of the first part the option of cancellation of this contract.

(4) The party of the first part is not to be responsible for delays caused by strikes, accidents or causes beyond its control. 7838

(5) This contract to go into effect on 5th day of November, 1907, and continue in force until 5th day of November, 1908, and thereafter from year to year unless written notice is mailed to the address of either party, by the other, sixty (60) days prior to 5th day of November of any year, in which event upon the arrival of such date the contract is to be terminated.

7839

(6) This contract does not become effective until accepted by the E. I. DU PONT DE NEMOURS POWDER COMPANY, at its main office at Wilmington, Delaware.

E. I. DU PONT DE NEMOURS POWDER COMPANY,
By R. W. Watkins.
GREAT NORTHERN FUEL CO.,
By I. B. Grant, G. M.

ACCEPTED at Wilmington, Del., Oct. 12, 1907.
E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Eugene Du Pont, G. S. A.

7840 *Plaintiff's Exhibits 788, 901*

Following letter attached to contract (Exhibit 788) and marked Plaintiff's Exhibit 789:

Wilmington, Del., July 29, 1908.

Mr. Walter G. Clark, Mgr.,
St. Louis, Mo.

Dear Sir:— File SD-3014.

Our contract with the Great Northern Fuel Co., Novinger, Mo., which requires a notice of 60 days to discontinue, will expire November 5, 1908.

Please notify them at once that it is not our de-
7841 sire to continue this contract, and advise us on attached sheet the date you notify them.

Very truly yours,

A. D. S.

Plaintiff's Exhibit 901.

THIS CONTRACT entered into this first day of August, 1906, by and between the E. I. DU PONT COMPANY, a corporation of WILMINGTON, DELAWARE,
7842 party of the first part, and A. REENTS & BROTHER, KRAMM STATION, ILLINOIS, party of the second part.

(1) WITNESSETH: That the party of the first part hereby sells and the party of the second part hereby purchases all of the blasting powder required by the party of the second part for one year, at the following operations:

A. REENTS & BROTHER, KRAMM STATION, ILLINOIS. At the price of $1.05 per keg of twenty-five (25) pounds each, delivered, f. o. b. the points aforesaid in lots of four hundred (400) kegs, and price of $1.00 per keg of twenty-five (25) pounds each, delivered, f. o. b. the points aforesaid, in lots of eight hundred (800) kegs.

Plaintiff's Exhibit 901 7843

(2) It is agreed that powder furnished under this contract is for consumption of the second party only, and not for sale, except to its own miners and employes, and that a violation of this clause gives to the party of the first part the option of cancellation of this contract.

(3) Deliveries to be made in carloads of not less than four hundred (400) kegs.

Terms: Sixty days (60) or two per cent (2%) discount for cash within ten (10) days from date of invoice. 7844

(4) The party of the first part is not to be responsible for delays caused by strikes, accidents, or causes beyond its control.

(5) This contract does not become effective until accepted by the E. I. du Pont Company at Wilmington, Delaware.

E. I. DU PONT COMPANY,
By Dooley Bros., Agts.
A. Reents & Bros. 7845

ACCEPTED at Wilmington, Del.,
August 13, 1906.
E. I. du Pont Co.
(Sgd) per Eugene du Pont,
G. S. A.

7846 **Plaintiff's Exhibit 962.**

THIS CONTRACT entered into this 24th day of July, 1908, by and between the E. I. DU PONT DE NEMOURS POWDER COMPANY, a corporation of the State of New Jersey, party of the first part, and WESTERN COAL AND MINING COMPANY, a corporation of the State of Missouri, party of the second part.

(1) WITNESSETH: That the party of the first part hereby sells and the party of the second
7847 part hereby purchases all of the BLASTING POWDER requirements, required by the party of the second part, during the period of this contract, for use in coal mines located in the states of Missouri, Kansas, Arkansas and Oklahoma, at the following prices:

KANSAS OPERATIONS.

BLASTING POWDER: Furnished in lots as wanted and delivered by team to mines owned or operated by party of the second part located in Cherokee and Crawford Counties, Kansas, and
7848 within wagon hauling distance of the Pittsburg mill owned by the party of the first part, in Barton County, Missouri, at the following prices.

Kegs containing twenty-five (25) pounds, one dollar and fifteen cents ($1.15) each; half kegs, containing twelve and one-half (12½) pounds each, sixty-five cents (65c) per package.

It is agreed that the party of the first part shall make an allowance of five (5) cents each to party of the second part for empty kegs of its own manufacture, delivered to the teams of the party of the first part at the mines of the party of the second part situated at CRAWFORD AND CHEROKEE COUNTIES, KANSAS, and BARTON COUNTY, MISSOURI, in good, serviceable condition including stoppers. The party of the second part also agrees to provide

proper facilities for the storing of empty powder kegs, so that they may be delivered to party of the first part perfectly dry, both inside and out.

MISSOURI OPERATIONS.

BLASTING POWDER: Furnished in carload lots of not less than 800 kegs of twenty-five (25) pounds each, f. o. b. railroad station in the state, one dollar and fifteen cents ($1.15) per keg.

7850

ARKANSAS OPERATIONS.

BLASTING POWDER: Furnished in carload lots of not less than 800 kegs of twenty-five (25) pounds each, f. o. b. any railroad station in the state, one dollar and twenty-five cents ($1.25) per keg.

OKLAHOMA OPERATIONS.

BLASTING POWDER: Furnished in carload lots of not less than 900 kegs of twenty-five (25) pounds each, f. o. b. any railroad station in the state, one dollar and twenty-five cents ($1.25) per keg.

7851

Any other explosives or blasting supplies not specified in this contract to be furnished at current prices which are charged by the du Pont Company in the district in which the explosives or blasting supplies are to be used.

The prices herein are based on present freight rates, and present minimum carload quantity, but in case the present freight rate or present minimum carload quantity are increased or decreased during the existence of this contract, the amount of such increase or decrease shall be added to or deducted from the above prices.

7852 *Plaintiff's Exhibit 962*

The prices herein are also based on present method of packing and transporting powder, but in case the present method of packing and transporting is prevented by law or railway association regulations during the existence of this contract, then in that event this contract may, at the election of the party of the first part, be terminaed.

The following conditions are mutually accepted.

7853 (2) TERMS ARE thirty days net or two per cent (2%) discount for cash ten days from date of bill.

ADDITIONAL CLAUSE: 4. The party of the first part may, at its option, furnish, in case of accident to its mill, from which the supply of blasting for any given operation of the party of the second part would be ordinarily furnished, blasting of standard quality and reputable make.

7854 (3) It is agreed that explosives furnished under this contract shall be solely of the du Pont manufacture and are for consumption of the party of the second party only and not for sale except to its own sub-contractors or employes and that a violation of this clause gives the party of the first part the option of cancellation of this contract.

(4) The party of the first part is not to be responsible for delays caused by strikes, accidents or causes beyond its control. (See above for additional to this clause).

(5) This contract to go into effect on the 1st day of August, 1908, and continue in force until the 1st day of August, 1909, and thereafter from

year to year unless written notice is mailed to the address of either party, by the other, sixty (60) days prior to the 1st day of August of any year, in which event upon the arrival of such date the contract is to be terminated.

(6) This contract does not become binding until accepted by the E. I. DU PONT DE NEMOURS POWDER COMPANY, at its main office at Wilmington, Delaware.

7856

E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Walter Clark, Manager.
WESTERN COAL AND MINING CO.,
By D. Simpson, Purchasing Agent.

Accepted at Wilmington, Del.,
July 27, 1908,
E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Chas. Patterson.

7857

Plaintiff's Exhibit 1027.

THIS AGREEMENT made this 20th day of June, 1904, between the EXPLOSIVES SUPPLIES COMPANY, a corporation of the State of New Jersey, party of the first part, and the WESTERN COAL & MINING COMPANY, and the Rich Hill Coal Mining Company of St. Louis, Missouri, incorporated under the laws of the State of Missouri, parties of the second part.

WITNESSETH: That for and in consideration of one dollar ($1.00) paid in hand by the party of the second part to the party of the first part, receipt of which is hereby acknowledged, the party

7858 *Plaintiff's Exhibit 1027*

of the first part hereby sells and the party of the second part buys fifty per cent (50%) of the Black Blasting powder in kegs of twenty-five pounds (25 pounds) each, required for use in the mines, owned, leased or controlled by second party, and such mines as they may acquire during the life of this contract, for the period of two years from July 7, 1904, to July 7, 1906, at the following prices:

$1.10 per keg f. o. b. cars at their mines in Missouri; $1.12½ per keg, f. o. b. cars at their mines
7859 in Kansas; or $1.10 per keg, if delivered from local mills; $1.15 per keg, f. o. b. cars at their mines in Arkansas; $1.25 per keg, f. o. b. cars at their mines in Indian Territory.

The following conditions are mutually accepted:

(a) First party agrees to allow second party the actual carload freight charges from shipping to delivery points.

(b) TERMS are 60 days, or two per cent (2%)
7860 discount for cash if remitted within ten days from date of invoice.

(c) Second party agrees to accept from first party at Blasting powder in carload lots of not less than 800 kegs of 25 lbs. each.

(d) It is agreed that powder furnished under this contract is for consumption of the second party only, and not for sale except to its own miners, lessees or employees. It is agreed that a violation of this clause gives to first party the option of cancellation of this contract.

(e) It is further agreed between the parties hereto, that the powder to be furnished under this

contract shall be of the usual standard quality as heretofore furnished, and of such size of grain as may be designated by the party of the second part, and in case of explosion, or other contingencies beyond the control of the party of the first part, said parties shall have the privilege of furnishing any standard brand of powder for such time as said contingencies referred to may interfere with the regular manufacture of powder.

(f) It is undestood that the prices above named 7862
are based upon the cost of Nitrate of Soda at $1.08 per one hundred pounds in New York current funds f. o. b. New York City, and the price of powder under this contract shall advance at the rate of one cent per keg for every five cents per 100 pounds advance in Nitrate of Soda above $2.05 per 100 lbs.

(g) It is agreed between the parties hereto, that the parties of the second part will place orders for shipment 30 days in advance of the time at which shipments are required, and in case said 7863
first party fails to make shipment as specified, said second party may purchase powder at the market price and charge the party of the first part with the diffeence between the purchase price for powder in the open market and the price mentioned in this contract for the various mines.

(h) Parties of the first part agree to furnish powder to the party of the second part at prices no higher than those mentioned in this contact, except as provided for in paragraph (f). In case parties of the first part reduce their pice to any company, coporation or individual in the state of Missouri (except to points on west bank of the Mississippi River, which take Illinois price), Arkansas, Kan-

sas or Indian Territory, below the price named herein for each of these states, parties of the first part guarantee to parties of the second part a like reduction in price for similar deliveries so long as they make such reduced prices and in such quantities.

(i) It is further agreed between the parties hereto that the duration, prices and conditions of this contract shall not be divulged.

7865

Dated, at St. Louis, Mo., June 20, 1904.

EXPLOSIVES SUPPLIES COMPANY,
By Geo. S. Oliver, Vice-Prest.

WESTERN COAL & MINING COMPANY,
By D. Simpson, Purch. Agent.

RICH HILL COAL MINING COMPANY,
By D. Simpson, Purch. Agent

7866

Plaintiff's Exhibit 1093.

COMPANIES OWNED BY EASTERN DYNAMITE COMPANY AUGUST 1, 1903.

Acme Powder Company, 400; Amer. Forcite P. Mfg. Co., 9,000; Blue Ridge Powder Co., 220; Clinton Dynamite Co., 100; Columbian Powder Co., 200; Dittmar Powder & C. Co., 1,000; Enterprise High Expl. Co., 240; Hecla Powder Co., 933; Hudson River Powder Co., 150; *James Macbeth Co., 1,000; Mt. Wolf Dynamite Co., 120; Penna. Torpedo Co., 50; Standard Expl. Co. Ltd., 100; *Sterling Dynamite Co., 250; United States Dyn. Co.,

120; *Atlantic Dyn. Co. of N. J., 5,500; *Atlantic Dyn. Co. of N. Y., 20; *Atlantic Mfg. Co., 1,000; *Electric Exploder Co., 250; *Explosive Supplies Co., 500; *Forcite Pdr. Co. of N. J., 3,000; *Forcite Pdr. Co. of N. Y., 25; *Hecla Dynamite Co., 50; *Hercules Powder Co.—1903, 5,000; *Hercules Powder Co., N. Y., 30; *Hudson River Wood Pulp Mfg. Co., 150; *Joplin Powder Company, 250.

7868

Plaintiff's Exhibit 1094.

*National Torpedo Co., 1,002; *New York Pdr. Co. of N. J., 500; *New York Pdr. Co. of N. Y., 10; *Oliver Dynamite Co., 500; *Producers Powder Co., 1,000; *Repauno Chem. Co. of N. Y., 50; *Repauno Chem. Co. of Del.—1903, 5,000; *Repauno Mfg. Co., 5,000; *Weldy Dynamite Co., 200; *Western Torpedo Co., 50.

*These Companies were organized by the Eastern Dynamite Company and were never independent organizations. 7869

Plaintiff's Exhibit 1095.

PLANTS—MARCH 1, 1902, to SEPTEMBER 18, 1908.

E. I. DuPont deNemours & Co. (Plants owned directly or through stock ownership, March 1, 1902):

Brandywine, Wilmington, Delaware; Carney's Point, Pennsgrove, New Jersey; Fairchance, Oliphant Furnace, Pennsylvania; Hazardville, Hazardville, Connecticut; Meadowbrook, Fairmont,

7870 *Plaintiff's Exhibit 1095*

West Virginia; Mooar, Keokuk, Iowa; Newhall, Newhall, Maine; Scitico, Hazardville, Connecticut; Tamaqua, Tamaqua, Pennsylvania; Wapwallopen, Wapwallopen, Pennsylvania; Sycamore, Sycamore, Tennessee.

(Plants owned by Laflin & Rand Powder Co. March 1, 1902, acquired later by E. I. duPont de-Nemours Powder Company):

7871 Columbus, Columbus, Kansas; Haskell, Haskell, New Jersey; Moosic, Moosic, Pennsylvania; Orange, Newburgh, New York; Penna. & Kansas, Pittsburg, Kansas; Pleasant Prairie, Pleasant Prairie, Wisconsin; Rosendale, Rosendale, New York; Rushdale, Germyn, Penna.; Schaghticoke, Schaghticoke, N. Y.; Wayne, Wayne, New Jersey.

(Plants owned or controlled jointly by duPont and Laflin & Rand Powder Companies):

7872 Ashburn, Ashburn, Missouri; Belleville, Belleville, Illinois; Birmingham, Birmingham, Alabama; Chattanooga, Ooltowah, Tennessee; Clinton, Haverstraw, New York; Consumers, Gracedale, Penna; Dorner, Newport, Indiana; Enterprise, Dyn., Newquehoning, Penna.; Enterprise, Black, Gracedale, Penna.; Farmingdale, Farmingdale, New Jersey; Ferndale, Ringtown, Penna.; Fontanet, Fontanet, Indiana; Forcite, Landing, New Jersey; Kingston, Kingston, New York; Kellogg, Kellogg, West Virginia; Kenvil, Kenvil, New Jersey; Marquette, Marquette, Michigan; Mauch Chunk, Mauch Chunk, Penna.; Oliver, Dyn., Oliver Mills, Penna.; Oliver, Black, Oliver Mills, Penna.; Repauno, Gibbstown, New Jersey; Riker, Punxsutawney, Penna.; Shenandoah, Ringtown, Penna.; Youngstown, Youngstown, Ohio; Weldy, Tamaqua, Penna.; Bartlesville, Bartlesville, Okla.; Bradner,

7873

Bradner, Ohio; Findlay, Findlay, Ohio; Howard Junction, Bradford, Penna.; Lima No. 1, Lima, Ohio; Lima No. 2, Lima, Ohio; Montpelier, Montpelier, Indiana; Neodesha, Neodesha, Kansas; Princeton, Princeton, Indiana; Robinson, Robinson, Illinois.

(Plants acquired by E. I. duPont, de Nemours & Co. or E. I. duPont de Nemours Powder Co. by purchase, after March 1, 1902):

7874

Conemaugh, Johnstown, Penna.; Emporium, Emporium, Penna.; Hercules, Pinole, California; Judson, Noble, California; Oakland, Oakland, New Jersey; Santa Cruz, Santa Cruz, California; Vigorit, Vigorit, California; Bullis Mills, Bullis Mills, Penna.

(Plants constructed by E. I. duPont, deNemours & Co. and E. I. duPont, deNemours Powder Co. after March 1, 1902):

7875

Barksdale, Barksdale, Wisconsin; Casey, Casey, Illinois; Connable, Birmingham, Alabama; duPont, duPont, Washington; Hartford City, Hartford City, Indiana; Joplin, Joplin, Missouri; Louviers, Louviers, Colorado; Nemours, Nemours, West Virginia; Patterson, Patterson, Okla.; Sterling, Lewisburg, Alabama.

7876 **Plaintiff's Exhibit P-1111.**

THIS CONTRACT made and entered into this First day of November, 1903, by and between Buckeye Powder Company, party of first part, and its employees, United Powder and High Explosives Workers of America, No. 124, party of second part, WITNESSETH:

The said parties hereby agree as follows:

Item 1. This contract shall bind the parties
7877 hereto, their successors and assigns for Ten months from November 1st, 1903, to September 1st, 1904.

Item 2. The output of the plant is limited by the present and future capacity of its machinery and equipment and the demand for its powder. It is the intent of both parties that all orders for powder shall be promptly and satisfactorily filled, and that an ample reserve of 25,000 kegs, more or less, may be kept in the Company's magazine to cover emergencies and unusual demands.

Item 3. No employee, unless sick and unable to work, shall absent himself from duty without first
7878 notifying the Superintendent and receiving permission from him. Any one violating this rule shall be suspended from duty for five days; for second similar offence for ten days; and for third, shall be dismissed.

Item 4. Should any employee reporting for duty, or while at work, be found intoxicated, it will be sufficient cause for his dismissal.

Item 5. It is also agreed:

That this being a hazardous business, it is the earnest desire of both parties to the contract that the strictest care shall at all times be exercised by each and every employee to avoid accidents and for the preservation of life and property. To accomplish this it is hereby agreed: that the tram road, cars, powder carts and vehicles for the transporta-

7879

tion of powder, shall be kept in good order and be used with care; that the machinery that is specially used for making powder be kept in good condition, clean and well oiled.

It is further agreed: that it is the duty of every employee working in or about a powder mill to immediately report any break or imperfect condition of machinery in or connected with such mill to the Superintendent of the plant. It shall then be the duty of the Superintendent to go at once to the place and take such action as will repair the break 7880
or imperfection.

Item 6. It shall be the duty of each employee to keep his mill and its surroundings clean and in good order. To do this it is agreed that every man shall clean up his mill every afternoon, when his day's work has been finished and that he shall carefully inspect the condition of the machinery and building when going on and retiring from duty.

Item 7. The Union Label shall be put on all powder manufactured by Buckeye Powder Company and its use be governed by the following rules:

7881

(1) To entitle an employer to the use of the label of the U. P. & H. E. W. of A., all employees must be members of a Powder Workers union.

(2) The scale of wages adopted by the Local Union and approved by the President of the U. P. & H. E. W. of A. shall be paid by the employer.

(3) The Local Union shall not give more labels to the employers than are sufficient to cover the product for the ensuing week.

(4) The employer shall agree, should he at any time violate the rules under which

7882 *Plaintiff's Exhibit P-1111*

the Labels are issued to him, he will not use any more of the Union Labels, but will surrender them to the Secretary of the Local Union from WHOSE HANDS HE RECEIVED THEM.

(5) The employer will not imitate, duplicate or counterfeit in any way, the Label of the U. P. & H. E. W. of A., nor will he permit any one to do so for him or in his behalf.

7883 (6) The first party agrees to pay for these labels at actual cost.

Item 8. In the event that the machinery breaks down, or it is the Company's fault that the men by working eight hours cannot produce their quota of the 700 kegs of powder per day, the Superintendent may notify them there will be no more work for the men on duty that day. Should the Superintendent direct the men to work after expiration of their eight hours for the purpose of completing their portion of the day's run of 700 kegs, then for
7884 such overtime, such men shall be paid their scale of wages, pro-rata per hour, for such overtime.

Item 9. It is further agreed: that from five to eight trucks of powder grain shall stand over in the Corning Mill each night, with which to start the Glaze Mill the following day.

Item 10. It is agreed that should differences arise between the employees and Superintendent as to the construction of this contract, the subject of such disagreement shall be presented in writing by both parties to the President of the Company.

Should he fail to reconcile and adjust the differences, same shall then be referred to two disinterested arbitrators, one being selected by each of the parties interested. If they shall fail to agree, they shall select a third, and the finding of a majority

of this board shall be binding upon the parties, it being understood that there shall be no suspension of work during such adjustment.

Said arbitration shall be held within ten days after presentation of grievances by either party.

Item 11. All employees must abide by the general rules and regulations prescribed by the Company providing for the safety of life and the preservation of property.

Item 12. Rate of pay: 7886

	760 Kegs.
Wheel men—Three shifts.	
Head man	2.75
Second man	2.35
Press men	
Head man	2.75
Second man	2.35
Third man	2.35
Corning men	
Head man	2.75
Glaze	
Head man	2.75
Second man	2.35
Packing House and Separator	
Head man	2.75
Second man	2.35
Soda House	
One man	2.35
Pulverizer	
One man	2.35
Track men	2.35 each

7887

7888 *Plaintiff's Exhibit P-1112*

The following men who do no additional work on increased output receive no additional wages above the 700 keg rate.

Millwright
2 Engineers 12 hours each
2 Firemen 12 hours each
Laborers
2.75 per diem
80.00 per month
7889 2.25 per diem
1.75 per diem of 8 hrs.

Item 13. All of the parties hereto pledge themselves to perform faithfully the terms of this contract, and to this end have this day set their hands and seals.

BUCKEYE POWDER CO.
By R. S. Waddell, Prest.
R. S. Waddells, Jr., Secy.

Ernest Hauser,
J. Lot Reid,
7890 W. A. Justice.

Plaintiff's Exhibit P-1112.

THIS CONTRACT made and entered into this First day of September, A. D. 1904, by and between Buckeye Powder Company, party of first part, and its employees, United Powder and High Explosives Workers of America, No. 124, party of second part, WITNESSETH:

The said parties hereby agree as follows:

Item 1. This contract shall bind the parties hereto, their successors and assigns, from September 1st, 1904, to Sept. 1st, 1905.

Plaintiff's Exhibit P-1112 7891

Item 2. The output of the plant is limited by the present and future capacity of its machinery and equipment and the demand for its powder. It is the intent of both parties that all orders for powder shall be filled promptly, and with a quality of powder that will give thorough satisfaction to the trade: that an ample reserve of 35,000 kegs, more or less, may be kept in the Company's magazines to cover emergencies and unusual demands.

Item 3. No employee, unless sick and unable to work, shall absent himself from duty without first notifying the Superintendent and receiving permission from him. Any one violating this rule shall be suspended from duty for five days; for second similar offense for ten days; and for third, shall be dismissed. 7892

Item 4. Should any employee reporting for duty, or while at work, be found intoxicated, it will be sufficient cause for his dismissal.

Item 5. It is also agreed between party of first part, and each and every individual employee composing party of second part: 7893

That this being a hazardous business, where life and property are in constant peril; it is the earnest desire of both parties to the contract, that the strictest care shall at all times be exercised by each and every employee to avoid accidents and for the preservation of life and property. To accomplish this it is hereby agreed: that the tram cars, powder carts and vehicles for the transportation of powder, shall be kept in good order and be used with care; that tram cars shall not be driven, pushed or run with greater speed than a fast walk; that the machinery that is specially used for making powder be kept in good condition; be used with exceptional care; and any employee breaking this rule may be suspended from work five days; or be discharged from service at the discretion of the Superintendent.

7884 *Plaintiff's Exhibit P-1112*

It is further agreed: that it is the duty of every employee working in or about a powder mill to immediately report any break or imperfect condition of machinery in or connected with such mill to the Superintendent of the plant. It shall then be the duty of the Superintendent to go at once to the place and take such action as will repair the break or imperfection.

Item 6. It shall be the duty of each employee to keep his mill and its surroundings clean and in good
7895 order. To do this, it is agreed that every man shall clean up his mill every afternoon when his day's work has been finished, and that he shall carefully inspect the condition of the machinery and building when going on and retiring from duty.

All powder dust and grain shall be thoroughly cleaned up and be placed in two receptacles in each building. That portion of the dust and dirt, suitable for return to other mills for wheeling, pressing, etc., shall be placed in one box or barrel; and that which is mixed with dirt, placed in another
7896 barrel for return to the leeching vat for recovery of soda.

Item 7. The Union Label shall be put on all powder manufactured by Buckeye Powder Company and its use be governed by the following rules:

(1) To entitle an employer to the use of the label of the U. P. & H. E. W. of A., all employees must be members of a Powder Workers union.

(2) The scale of wages adopted by the Local Union and approved by the President of the U. P. & H. E. W. of A. shall be paid by the employer.

(3) The Local Union shall not give more labels to the employers than are sufficient to cover the product for the ensuing week.

Plaintiff's Exhibit P-1112 7897

(4) The employer shall agree, should he at any time violate the rules under which the Labels are issued to him, he will not use any more of the Union Labels, but will surrender them to the Secretary of the Local Union from WHOSE HANDS HE RECEIVED THEM.

(5) The employer will not imitate, duplicate or counterfeit in any way, the Label of the U. P. & H. E. W. of A., nor will he permit any one to do so for him or in his behalf. 7898

(6) The first party agrees to pay for these labels at actual cost.

Item 8. In the event that the machinery breaks down, or it is the Company's fault that the men by working eight hours cannot produce their quota of the 1100 kegs of powder per day, the Superintendent may notify them there will be no more work for the men on duty that day. Should the Superintendent direct the men to work after expiration of their eight hours for the purpose of completing their portion of the day's run of 1100 kegs, then for such overtime, such men shall be paid their scale of wages, pro-rata per hour. 7899

Item 9. It is further agreed: that from ten to twelve trucks of powder grain shall stand over in the Corning Mill each night, with which to start the Glaze Mill the following day.

Item 10. It is agreed that should differences arise between the employees and Superintendent as to the construction of this contract, the subject of such disagreement shall be presented in writing by both parties to the President of the Company, and shall specify the particular item in the contract that has been violated.

7900 *Plaintiff's Exhibit P-1112*

Should he fail to reconcile and adjust the differences, same shall then be referred to two disinterested arbitrators, one being selected by each of the parties interested. If they shall fail to agree, they shall select a third, and the finding of a majority of this board shall be binding upon both parties, it being understood that there shall be no suspension of work during such adjustment.

Said arbitration shall be held within ten days after presentation of written grievances by either
7901 party.

Item 11. All employees must abide by the general rules and regulations prescribed by the Company, which are set forth in copy hereto attached and made part of this agreement, or which may be adopted and posted by the Superintendent from time to time. Particularly such rules as provide for the safety of life and the preservation of property.

Item 12. Rate of Pay:

7902 This schedule of rates is based on a daily output of 1100 Kegs, packed, finished and received in good, merchantable condition, by the Superintendent, at the Packing House.

For each 100 Kegs of powder so accepted by the Superintendent, in excess of the 1100 Kegs daily output, each employee, not excepted, shall receive ten (10) cents additional daily pay, and for each 100 Kegs less than the agreed output of 1100 Kegs per day, each of said unexcepted employees shall receive ten (10) cents less wages per day.

For each 10 Kegs, or fractional part of 100 Kegs excess or deficiency of output, a proportionate allowance or reduction to be made.

Plaintiff's Exhibit P-1112 7903

SCHEDULE OF WAGES FOR 1100 KEGS.

Soda House.		
1 Head Man	$2.35	
1 Assistant	1.85	$4.20
Pulverize.		
1 Head Man	$2.35	
1 Assistant	1.85	4.20
Wheel Men.		7904
3 Head Men	8.25	
3 Assistants	7.05	15.30
Press Men.		
2 Head Men	5.50	
2 Assistants	4.70	10.20
Press Run.		
2 Men	4.70	4.70
Corning Mill.		
1 Man	3.00	3.00 7905
Glaze Men.		
1 Head Man	3.00	
1 Night Man	2.75	
2 Assistants	4.70	10.45
Packing House.		
1 Head Man	2.75	
1 2nd Man	2.35	
2 Assistants	3.70	8.80
Yard Men.		
4 Assistants	7.00	7.00
Millwright.		
1 Millwright	3.25	3.25

7906 *Plaintiff's Exhibit P-1112*

Engine House.

1 2nd Engineer	2.50		
1 Greaser	2.25		
3 Firemen	6.00	10.75	$81.85

The following representing the company:

1 Superintendent	Salary	
1 Chief Engineer	$4.00	$4.00
1 Head Yardman	2.00	2.00

7907

Grand Total $87.85

The following do not contribute to the increase or reduction of the daily output and therefore excepted from sharing in the increase or decrease of wages:

1 Night Glaze Man	$2.75	
5 Yardmen	9.00	
3 Engineers	8.75	
3 Firemen	6.00	
1 Millwright	3.25	$29.75

7908

BUCKEYE POWDER CO.,
By R. S. Waddell, Prest.

E. Homser,
James Carlton,
Jas. A. Sherman,
F. Peircefeild,
Geo. Barber.

Plaintiff's Exhibit 1116. 7909

FUNDAMENTAL AGREEMENT.

THIS AGREEMENT, made this 19th day of December, 1889, between E. I. Du Pont De Nemours & Company, a co-partnership doing business near Wilmington, Delaware; The Hazard Powder Company, a corporation organized under the laws of the State of Connecticut; the Laflin & Rand Powder Company, a corporation organized under the laws of the State of New York; the three individual concerns named in the foregoing being in some 7910
of the provisions hereof grouped as one collective party, and called the "Three Companies"; and the Oriental Powder Mills, a corporation organized under the laws of the State of Maine; The American Powder Mills, a corporation organized under the laws of the State of Massachusetts; the Austin Powder Company, the Miami Powder Company, The King Powder Company, The Ohio Powder Company, said last named four corporations being organized under the laws of the State of Ohio; The Sycamore Powder Company, a corporation organized under the laws of the State of Tennessee; the 7911
Lake Superior Powder Company, a corporation organized under the laws of the State of Michigan; the Marcellus Powder Company, a corporation organized under the laws of the State of New York.

WHEREAS, the parties hereto make and sell gunpowder for blasting or sporting purposes, or both; and

WHEREAS, the said parties now enjoy trade of a certain amount in one or both of the said two kinds of powder; and

WHEREAS, for the purposes of this agreement "Blasting" powder is defined to be, such powder

7912 *Plaintiff's Exhibit 1116*

as is made of either nitrate of potassa or nitrate of soda, mixed with charcoal and sulpher, and designed to be used for mining or blasting operations; and "Sporting" powder is defined to be such powder as is made of nitrate of potassa, charcoal and sulpher, and designed for use in small arms (rifles, or smooth bores), cannon, mortars and shells; or in the manufacture of fireworks, safety-fuse and squibs; being of varying qualities and strength and of many brands and tradenames, all of which are
7913 distinctly different from those of blasting powder; and

WHEREAS, in certain portions of the United States the cost of selling said powder is excessive; and

WHEREAS, for this and other causes the carrying on of business has been unsatisfactory in the greater part of the United States to the above name dparties; and

7914 WHEREAS, it is important that reasonable and uniform prices should be maintained, that customers and the public generally should be relieved from the inconveniences and uncertainties due to rapid and uncertain fluctuations, that unjust discrimination between persons and localities should be avoided, and that contractors and other consumers should be enabled to arrange with reasonable certainty such portions of their business as are dependent upon the acts of the parties hereto; and

WHEREAS, it is therefore desired by all parties hereto to enter into the agreement hereinafter set forth;

NOW THEREFORE, IN CONSIDERATION of

the premises, and in consideration of one dollar and other good and valuable considerations to each of the parties by each of the others paid, the receipt of which is hereby acknowledged; for the purpose of regulating in a convenient and desirable manner the business of the parties hereto, in such of their sales of powder as are treated in this agreement; for the purpose of avoiding unnecessary loss in the sale and disposition of such powder by ill regulated or unauthoribed competition and underbidding by the agents of the parties hereto, and 7916
for the purpose of protecting consumers and the public from unjust fluctuations in prices and from unjust discriminations.

IT IS HEREBY AGREED BY THE PARTIES HERETO AS FOLLOWS:

I. That during the existence of this agreement the trade in gunpowder in and throughout all of the United States and its Territories, now or hereafter enjoyed by each and all of the parties hereto, shall be subject to the provisions of this agreement, 7917
with the following three exceptions, viz.:—

(1) Such trade as either of said concerns constituting the parties hereto may now or hereafter have in powder actually exported to foreign countries.

(2) Such trade as either of said concerns constituting the parties hereto may now or hereafter have with the Government of the United States.

(3) Such trade in Blasting powder as either of said concerns constituting the parties hereto have in the Anthracite Regions of the State of Penn-

7918 *Plaintiff's Exhibit 1116*

sylvania. (This trade having been retained at extraordinary sacrifices by the manufactories located within said district, some of which are owned or controlled by certain of the parties to this agreement is to belong to the parties who now enjoy it, and no part of the same is to be taken by or shared with either of the nine concerns last named in the first paragraph of this agreement.)

The said Anthracite Regions of Pennsylvania are understood and agreed to be bounded and described
7919 as follows: All of the Northumberland County; all of Montour Caunty; all of Columbia County; all of Luzerne County; all of Lackawanna County; in Susquehanna County the following named townships: Clifford, Herrick and Ararat; all of Wayne County except the townships touching on the Delaware River; all of Carbon County; all of Schuykill County; that portion of Lebanon County north of the "First Blue Mountain"; and that portion of Dauphin County, north of the Southern boundaries of the townships of Rush and Middle Paxton—be-
7920 ing practically that portion of Dauphin County north of the "First Blue Mountain."

II. That that portion of the United States, within which the regulation of trade is contemplated by this agreement, shall for that purpose be divided into districts within each of which uniform prices shall generally prevail, and said "Districts" are defined as follows:

First District: The territory as follows: The New England States, excepting the County of Rutland in the State of Vermont, which is included with the State of New York, in the Second District; and excepting that the price for blasting powder, only, at ports upon Long Island Sound,

west from Westerly, R. I., included, shall be twenty-five cents per keg lower than the miuimum price for the same in the First District, generally; provided however, that such lower price shall not be made less than the regular list price for New York City.

Second District: The territory as follows: The States of New York (the County of Rutland, Vt. included therewith), New Jersey, Pennsylvania, Delaware, Maryland, West Virginia (excluding 7922
Bramwell as provided hereinafter), Ohio, Indiana, Illinois, and those portions of the states of Michigan and Wisconsin south of the 44th, parallel of latitude; and the towns of the banks of the Potomas, the Ohio, and the Mississippi Rivers, adjoining said territory.

Third District: The territory as follows: The states of Minnesota, Iowa, Missouri, Kentucky, Tennessee, Virginia (Bramwell, W. Va. to be included also in this district), North Carolina, and
those portions of the states of South Carolina, 7923
Georgia, Alabama and Mississippi north of the 33rd, parallel of latitude, and also those portions of the state of Michigan and Wisconsin north of the 44th parallel of latitude; and also all that part of the State of Kansas east of the 98th meridian of longitude; and the towns in Arkansas on the bank of the Mississippi River.

Fourth District: The territory as follows: The State of Arkansas, excepting the towns on the bank of the Mississippi River, the states of Louisiana and Florida and those portions of the state of Mississippi, Alabama, Georgia and South Carolina, outh of the 33rd parallel of latitude, and also those

7924 *Plaintiff's Exhibit 1116*

portions of Dakota and Nebraska east of the 103rd meridian of longitude, except the towns therein which adjoin the eastern boundaries thereof; and also all of the State of Kansas, west of the 98th meridian of longitude.

Fifth District: The territory as follows: The Indian Territory and the State of Texas.

Sixth District: The "Neutral Belt," which con-
7925 sists of the states of Colorado and Montana and the territories of Wyoming, Utah and New Mexico, all of the same; and also those portions of Dakota and Nebraska, west of the 103rd meridian of longitude.

Seventh District: All of the states and territories of the United States west of the western boundaries of the said "Neutral Belt," which are named as follows: Oregon, Washington, Idaho, California, Nevada and Arizona.

III. That of the whole aggregate trade of all the
7926 concerns comprising the parties hereto, which is made subject to this agreement, division shall be made among said parties in the manner hereinbelow provided:

The yearly allotments of trade to the "Three Companies" shall be to them as one collective party, and shall be in such quantities of sporting and blasting powder as shall be equal to the average sales made by them of said kinds, respectively, for the years 1882, 1883 and 1884. (Sptg. 209, 738, Blstg. 562, 420.)

The yearly allotments of trade to the other concerns, parties to the agreement, shall be as follows:

Plaintiff's Exhibit 1116 7927

Oriental Powder Mills.

Sporting powder, twenty-four thousand two hundred and twenty-three (24,223) kegs.

Blasting powder, sixty-five thousand one hundred and fourteen (65,114) kegs.

American Powder Mills.

Sporting powder, thirty-one thousand seven hundred and fifty (31,750) kegs. 7928

Blasting powder, fifty-seven thousand three hundred and sixty-six (57,366) kegs.

Austin Powder Company.

Sporting powder, fifteen thousand five hundred and seventy-five (15,575) kegs.

Blasting powder, sixty-five thousand (65,000) kegs.

Miami Powder Company.

Sporting powder, eleven thousand four hundred and fifty-two (11,452) kegs. 7929

Blasting powder, sixty-six thousand five hundred and twenty (66,520) kegs.

The King Powder Company.

Sporting powder, twenty-five thousand (25,000) kegs; and besides these there shall be a special allotment to said company of five thousand (5,000) kegs of sporting powder.

Blasting powder to the same company, one hundred thousand (100,000) kegs.

The Ohio Powder Company.

Blasting powder, sixty thousand (60,000) kegs.

7930 *Plaintiff's Exhibit 1116*

The Sycamore Powder Company.

Sporting powder, eight thousand (8,000) kegs.
Blasting powder, thirty thousand (30,000) kegs.

The Lake Superior Powder Company.

Blasting powder, twenty thousand (20,000) kegs.

The Marcellus Powder Company.

7931 Blasting powder, twenty thousand (20,000) kegs.

Making the total of the sums which are thus allotted and taken as the bases for the division of said trade to be:

Of sporting powder,
Of blasting powder,
(Excluding the said special allotment of 5,000 kegs of sporting powder to the King Powder Company.)

IT IS ALSO UNDERSTOOD AND AGREED That the sales out of the above allotments of all of the parties hereto in the following states and territories, viz: California, Nevada, Oregon, Colorado, Washington, Idaho, Arizona, Montana, Utah and New Mexico are to be regulated by a certain supplementary agreement to be entered into between all of the concerns composing the parties hereto with the California Powder Works.

7932

IV. That the aggregate sales made by all the parties hereto in any one year of sporting and of blasting powder shall, for each kind separately, be considered as a volume of trade of certain value to be divided among all of said parties in direct proportion to the yearly allotments to each and by the method hereinbelow set forth:

The value of said volume of trade shall be reck-

oned at the rate of thirty-five (35) per cent of the list price per keg for sporting powder, and twenty-five (25) per cent of the list price for blasting powder, in the "Second District;" subject to change as said list prices may be changed; said values so reckoned being now for sporting powder $1.75 per keg and for blasting powder 50 cents per keg.

The method for determining the "list price" last mentioned to be used as the basis for said adjustment of sales of either of said kinds of powder, shall be by taking the average of the prices for the 7934
months of the period under treatment (considering as a whole month a fraction greater than one-half) as said prices shall have been fixed in accordance with the provisions of this agreement.

V. That the periods for settlement in division of trade shall be as follows:

The first period shall be, and shall comprise the sales of, the six months ending June 30, 1890, made by all the parties hereto, and subsequently the periods shall be each comprising their sales for 7935
twelve months and ending June 30th of each year. And adjustment of differences in sales for said first period shall be upon the basis of one-half of said allotments.

VI. That at the end of each of said periods, and within sixty days thereafter, each of the parties hereto (the "Three Companies" for this purpose being considered as one party) shall make up separate sworn statements showing their sales of sporting and blasting powder, respectively, made within said periods, and forward the same to the Board of Trade, hereinafter provided to be established.

The Board of Trade shall consider separately the

7936 *Plaintiff's Exhibit 1116*

sales of sporting and blasting powder as the same shall appear in said sworn statements, and shall make computation of the differences therein exhibited (by said differences meaning the sales in excess or in deficiency of the proportions to which each party should be entitled in the division of trade as provided by Section IV. hereof); and, considering and valuing said differences, at said rates per keg for the respective kinds of powder, shall make adjustment or clearance of such differences,
7937 in money values, and shall furnish each party a written accounting in full detail, of such clearing process; and the same proving to be a correct computation, the liabilities of the parties shall be as thus determined and stated; and within thirty days from that time each party so made liable shall pay into the treasury such sum of money as shall have thus been adjudged to be due from it. And all of said money thus paid into the treasury shall be distributed among the parties hereto, entitled to the same, in sums to each of them as the same shall
7938 have been determined by said accounting of the Board of Trade.

VII. That in addition to the sworn statements to be made at the end of each of said periods as hereinbefore provided for, each of the parties hereto (the "Three Companies" for this purpose being considered as one party) shall at the end of each quarter of each calendar year, and within thirty days thereafter, make up statements which shall be estimates, as nearly correct as practicable, of their sales of each of said kinds of powder during said quarter and shall immediately forward the same to the said Board of Trade which shall immediately furnish each of the parties hereto with a combined statement of all of said sales during said quarter,

showing the sales of each of said parties, of each of said kinds; which said combined statement is to be for the guidance of each of the parties; to the end that their sales may not, for the whole of the then current period, be in excess of their allotments.

VIII. That in all statements of sales provided by this agreement to be made and in all adjustments thereunder, sporting powder, whether sold in packages of twenty-five pounds each or in packages of other sized, and whether of one quality or another, shall be considered and taken as if the same were all of one quality, to wit: "Rifle" (now so-called in the trade) powder; and shall be stated in units of twenty-five pounds each and fractions thereof, if any, in decimals, and blasting powder whether made of nitrate of potassa or of nitrate of soda, shall be considered and taken as if made of the last-named material. 7940

IX. That in none of the statements hereinbefore provided to be made by the parties hereto concerning their sales and for the purpose of dividing the whole of their trade which is subject to the provisions of this agreement shall there be counted or included any sales of powder made by any one of them to any other of them. It being intended that if one party shall sell powder to another such powder shall be counted only in the sales of the party who shall market the same. 7941

X. That the statements of sales made by each of the parties hereto for the purpose of dividing the trade of the first period (January 1st-June 30th, 1890,) shall include all the powder delivered in said period though the same may have been sold previously.

7942 *Plaintiff's Exhibit 1116*

XI. That immediately after the adoption of this Agreement, there shall be elected a Board of Trade, so to be called, consisting of five members, and a Secretary and Treasurer of the same.

XII. That at all elections of the members of the Board of Trade and of a Secretary and Treasurer of the same, voting shall be by ballot and each of the parties to this Agreement shall have one vote (thus providing for one vote by each of the "Three
7943 Companies") and a majority of the votes so cast shall elect; parties hereto not present at a meeting may be represented by personal proxy.

XIII. That there shall be an Annual General Meeting of all the parties hereto, to be held in the month of September, in each year, to hear reports and to transact such other business contemplated by the provisions of this Agreement, as may come before it.

7944 XIV. That besides the Annual Meeting there may be other General Meetings of all the parties hereto, for special purposes, but the same to be valid and of authority shall be called by the Secretary with due notice to all, setting forth the definite purpose for which such meeting shall have been requested. And the Secretary shall, at any time, call such a meeting on written request from any of the parties hereto stating the purposes as aforesaid. A temporary Chairman shall be elected at each General Meeting to preside over the same. All General Meetings and Meetings of the Board of Trade shall be held in the City of New York unless by general consent some other place be agreed upon.

XV. That at each Annuel General Meeting

there shall be an election of members of the Board of Trade and of a Secretary and Treasurer of the same; but in default of such election the Board of Trade as then constituted, and its Secretary and Treasurer, shall continue in performance of their respective functions until their successors shall be chosen; which may, in such case, be done at any General Meeting of all the parties hereto held as hereinbefore provided.

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XVI. That the Board of Trade shall elect one of their number to be Chairman, and at any meeting of the Board each member present shall have one vote and the adoption of a proposed measure shall be by a majority of much votes. And any vacancy in the Board caused by death or resignation of one of their number may be filled by the remaining members; but in default of their so doing, within sixty days, a General Meeting shall be called to elect a member to fill such vacancy.

The Board shall meet at least once in each quarter year and three of its members may constitute a 7947
quorum for the transaction of business; and at such meetings there shall be considered the quarterly statements, last made, as hereinbefore provided to be done.

XVII. That the Board of Trade shall have power to fix prices and to vary or change the same at any time and for any place, to meet contingencies and for protection of the common interests. It shall have power to enforce any rules and regulations which may be adopted by the parties to this agreement and to take any measures for that purpose which may in its judgment be necessary. It shall hear and adjudge in all cases of grievances,

when the parties involved shall not be able to agree among themselves.

The members of the Board shall be re-imbursed for all expenses incurred by them in performance of their duties.

XVIII. That any action taken at a General Meeting affecting the rights of any individual concern, shall have the unanimous consent of all the parties hereto to be valid and of authority; except-
7949 ing only in balloting for members of the Board of Trade and for the Secretary and Treasurer as hereinbefore, in Section XII. provided.

XIX. That any General Meeting duly authorized may review or reverse the acts of the Board of Trade and instruct it upon any matter. And at any General Meeting when a question shall be of approval or reversal of any previous acts or decisions, parties hereto not then present may have a vote upon such question by personal proxy giving power
7950 thereunto.

XX. That the duties of the Secretary and Treasurer shall be as follows: He shall issue notices for and shall attend all Meetings of the Board of Trade and all General Meetings of the parties hereto and shall keep a faithful record of the proceedings at all such meetings and shall send a copy of the same to each of the parties hereto. And he shall be the medium of communication between the members of the Board of Trade as well as between all parties to this agreement upon matters of general concern.

He shall receive and disburse all moneys for expenditures in the common interest in accordance with the methods prescribed therefor and shall make semi-annual reports to all the parties, of such

expenditures and of the disposition of all moneys coming to his hands.

He shall receive a salary of $2500 per annum for his services.

XXI. That all assessments of money for expenditures made or to be made for the common interest shall be upon each party in direct proportion as its allotment in number of kegs of both kinds of powder is to the total of the allotments to all the parties in number of kegs of both kinds 7952
(excluding said Special Allotment of sporting powder to The King Powder Co.) with exception only as provided in Section XXII. hereof. And no obligation for the payment of money shal be incurred, other than for such expenditures as are provided for in this agreement, except the same shall be done at a General Meeting as hereinbefore provided.

XXII. That any party hereto who shall suffer excessive loss by an overt act of the Board of Trade
—as for instance the reduction of a price at a 7953
place, in treatment of a local disturbance of trade —shall receive compensation for the damage it shall sustain by payment of money as may be agreed upon at a General Meeting, on the recommendation of the Board of Trade. And requisitions for money to pay such damages shall be made by the Board upon those of the parties who make and sell this specific kind of powder regarding which such award for damages shall have been settled; and contributions shall be required of them in direct proportion to their allotments of that specific kind of powder.

XXIII. That all the concerns constituting the parties hereto shall be and are severally bound to

7954 *Plaintiff's Exhibit 1116*

each other for the fulfillment of all the obligations of this agreement, but no concern shall be responsible for any default of any other concern.

XXIV. That an Agreement or Agreements, supplementary and auxiliary to this, shall be executed by all the parties hereto relating to the prices to be maintained for sales of powder, and the general harmonious arrangement of the powder trade.

7955 XXV. That the existing agreements between the twelve concerns, parties hereto, and the California Powder Works, and between the "Three Companies" and the other nine concerns, parties hereto, relating to the trade of the "Pacific Coast District" and the "Neutral Belt," shall continue with the consent of all the parties hereto, now expressed; and the consent thereto of the California Powder Works shall be obtained if practicable. New written Agreements to be the same in effect as those now existing shall be made and executed, if pos-
7956 sible, at an early date; the same to be co-terminous with this Agreement.

XXVI. That the benefits and liabilities arising from this Agreement shall extend to the successors and assigns of each of the concerns comprising the parties hereto and to the executors and administrators of the members of the firm of E. I. Du Pont, de Nemours & Company, but no concern shall be liable for any default not committed by itslef except as herein expressly specified.

XXVII. That this Agreement shall begin to be in effect on the 1st day of January, 1890, and shall remain in force until the 30th day of June, 1895, and shall continue in force thereafter from year to year, indefinitely, so long as none of the concerns

shall give written notice to all the others, through the Secretary of the Board of Trade, of its intention to withdraw at least three months previous to June 30th, 1895; but such notice having been given, in any year succeeding the year 1894, this Agreement shall terminate June 30th of said year.

XXVIII. That the Schaghticoke Powder Company, a corporation organized under the laws of the State of New York, being owned as to a majority of its stock, and controlled by the Laflin & Rand Powder Company, it is understood and agreed 7958
that all of its sales shall be considered as sales of the Laflin & Rand Powder Co., and said Leflin & Rand Powder Co. hereby guarantees that said Schaghticoke Powder Co. will respect and faithfully comply with all the provisions of this Agreement with the same effect as if it had signed this Agreement as a party hereto included under the name of the Laflin & Rand Powder Company.

XXIX. This shall be called the "Fundamental Agreement."

IN WITNESS WHEREOF, the concerns forming the parties hereto, have hereunto set their hands 7959
and affixed their corporate seals the day and year first above written.

(Signed)

E. L. DU PONT DE NEMOURS & CO.

THE HAZARD POWDER CO.

By W. G. Colvin, Vice. Pres.

(The Hazard
seal
Powder Co.)

LAFLIN & RAND POWDER CO.

By Solomon Turck, President.

(Laflin & Rand
Seal
Powder Company
1869)

7960 *Plaintiff's Exhibit 1116*

ORIENTAL POWDER MILLS
By Arthur Williams, President.

(Oriental
Seal
Powder Mills)

AMERICAN POWDER MILLS
A. O. Fay, President.

AUSTIN POWDER CO
R. T. Coleman, President.

(Austin Powder Co.
7961 Seal
of Cleveland
Ohio.)

MIAMI POWDER CO.
A. O. Fay, President.

THE KING POWDER CO.
By G. M. Peters, President.

THE OHIO POWDER CO.
By Richard Brown, President.

THE SYCAMORE MFG. CO.
By E. C. Lewis, President.

7962 THE LAKE SUPERIOR POWDER CO.
By C. H. Call, President.

(The Lake Superior
Seal
Powder Company)

MARCELLUS POWDER COMPANY
W. D. Colvin, President.

(Marcellus
Seal
Powder Company
Syracuse, N. Y.
1881)

Endorsed:

Fundamental Agreement. Twelve Companies. Taking effect Jan'y 1st, 1890.

Plaintiff's Exhibit 1146. 7963

Finance Committee.

Wilmington, Del., Dec. 23, 1902.

Messrs. E. I. du Pont de Nemours & Co.,
Wilmington, Del.

Gentlemen: In order to give the Finance Committee an intelligent starting basis, we would ask if you will kindly forward to us at once:

A—A general letter giving the views of your company as to the whole competitive situation. The 7964
combined facts thus obtained will afford a starting basis.

B—We would further ask that from time to time and continually, you forward everything of interest that may be picked up by any one connected with your firm bearing upon the general situation, even including gossip and rumor.

C—In event of any loss of business that you feel should have come to you under existing conditions, please advise us promptly, giving in fullest details such reasons as may be known to you accounting for your failure to receive the business. 7965

D—In addition to loss of your own business, we would ask that you should from time to time and continually, advise us of anything of interest concerning business held by competitors even though it may not be business in which you have a direct interest.

Until further advised, will you kindly address all such communications to A. J. Moxham, Wilmington, Del. Yours truly,

(Signed) A. J. MOXHAM,
Chairman.

(Exactly similar letter under same date addressed to Hazard Powder Company, Wilmington, Del., signed by A. J. Moxham, Chairman, and addressed "Finance Committeee.")

7966 **Plaintiff's Exhibit 1147.**

The Hazard Powder Company,
Manufacturers of Gunpowder.

Wilmington, Del., December 22, 1902.

Private and Confidential.
Mr. F. J. Waddell, Agent,
Cincinnati, O.

Dear Sir: We would state to you in confidence,
7967 and with a special request that the information be not in any way divulged, that arrangements have been perfected with the Laflin & Rand Powder Company by which the co-operation will be so complete as to amount to practically consolidation. We give you this information as it will doubtless govern you in your handling of our business. The Laflin & Rand Company will exist as a separate company under the same control as heretofore. As matters progress, if you find developments going on that appear to you as "playing into their hands" it may become intelligible to you when you realize that it
7968 will not be to our loss. On the other hand, if points of interest may arise whereby their co-operation will be to our good we will be glad to have you confidentially call our attention to the same.

We ask that no inkling of this should be permitted to reach any of the Laflin & Rand employees and that you give no confirmation to such rumors as may creep through the trade bearing on the matter.

Yours truly,

(Signed) A. J. MOXHAM,
President.

Plaintiff's Exhibit 1148. 7969

The Hazard Powder Company,
Manufacturers of Gunpowder.

Wilmington, Del., December 22, 1902.

Private and Confidential.
Mr. F. J. Waddell, Agent,
Cincinnati, O.

Dear Sir: I am glad to advise you that the Associates have agreed to change the policy of the past so 7970
far as investigation into causes of complaint is concerned. Hereafter principals are permitted to make a full and complete disclosure of every detail to salaried agents (but to salaried agents only), with the understanding that such complaints are to be so treated that no disclosure whatever is made to the customer interested: in other words, in submitting to you a complaint that is made of anything done in your territory, we ask that investigation be so made that the customer himself is not informed of the matter. The parties interested in agreeing to this insisted that *principals* should be 7971
held responsible if their *agents did make* any embarrassing disclosures to the customer. This in response to our agreement that an agent should in every way be accepted as representing a principal and as being treated with the same confidence in all business transactions.

I know there is no need to urge you not to make any such disclosures intentionally, but I do urge you to see that they are not made *accidentally* in future handling of such cases. I think nothing would better please those who are reluctant to the change than to be able to prove to the writer that he was wrong in the position assumed by him; hence the embarrasssment, if any occurs, will probably be greater to us than to the rest.

7972 *Plaintiff's Exhibit 1148*

As a matter of further information I would state that it has been agreed that at the will of the complainant, any dispute as to trade treatment may be referred to an Auditor, who will be Mr. O. E. Morton. This gentleman will have the fullest powers of investigation, such as examination of books, interviewing of witnesses, direct discussion with subagents, minor salesmen, or with the customers themselves if he should so elect. The defendant obligates himself to put at the disposal of such Auditor
7973 every shred of information that he may have. It is understood that the findings of the Auditor shall be simply as to the guilt in the particular sin that may be charged, but there is to be no disclosure beyond this finding so that there will be no danger of exposing any trade secrets to a competitor. The intent is to secure a penalty for a failure to live up to instructions that will be effective. Just what form it will take is not yet determined. As the expenses incurred will be heavy we think the weapon is one that will not be used lightly or in small
7974 differences of opinion or complaint. The cost of investigation will fall upon the party in error.

Kindly treat this as strictly confidential and not to be divulged.

Wishing you a Merry Christmas and a Happy New Year, Yours very truly,

(Signed) A. J. MOXHAM,
President.

Plaintiff's Exhibit 1164. 7975

(Government's Exhibit No. 148.)

Copy of Resolution of the Directors of the Delaware Securities Company, Sept. 23rd, 1902. Page 19 and 20.

"WHEREAS, the Laflin and Rand Powder Company is a corporation existing under the laws of the State of New York, having a capital stock of One Million Dollars, divided into ten thousand shares of the par value of One Hundred Dollars each,

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AND WHEREAS, T. Coleman du Pont is the owner of, or has an option upon, five thousand, five hundred and twenty-four shares of the capital stock of the said Laflin & Rand Powder Company, and is endeavoring to purchase or obtain like options on the balance of the shares of the capital stock of the said company,

AND WHEREAS, the said T. Coleman du Pont has the power to deposit seven thousand shares of the capital stock of the Eastern Dynamite Company, a corporation existing under the laws of the State of New Jersey, and also has the power to deposit ten thousand shares of the capital stock of E. I. du Pont de Nemours and Company, a corporation existing under the laws of the State of Delaware, as herein provided,

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AND WHEREAS, the said T. Coleman du Pont is able and willing to secure a contract on behalf of each of the following named, to wit: John L. Riker, J. A. Haskell, Schuyler L. Parsons, William Barclay Parsons and H. de B. Parsons that they will not engage, directly or indirectly in the manufacture of powder or other explosives, which contract will be of immense advantage to this company,

AND WHEREAS, the said T. Coleman du Pont has performed work and labor and services in securing the consent of the holders of said stock in the Lafln

7978 *Plaintiff's Exhibit 1164*

& Rand Powder Company to make sale thereof as herein provided, and in formulating and carrying out the plan hereby proposed, and in the organization and financing of this company, which services are, in the judgment of this Board of great value.

AND WHEREAS, it is proposed to make and execute the bonds of this company to the amount of Four Million Dollars, to be secured by a deed of trust pledging the shares of stock of the said Laflin & Rand Powder Company, the said Eastern Dyna-
7979 mite Company and the said E. I. du Pont de Nemours and Company.

AND WHEREAS, the said T. Coleman du Pont has secured an agreement, on the part of the said E. I. du Pont de Nemours and Company, to guarantee the payment of the principal and interest of said bonds without further charge to this Company.

AND WHEREAS, the said T. Coleman du Pont is willing to assign and transfer unto this company the said shares of capital stock of the Laflin & Rand Powder Company, including any stock which he may hereafter acquire, as the absolute property of
7980 this company, and is further willing to lend to and deposit with this company the said stock of the Eastern Dynamite Company and E. I. du Pont de Nemours and Company, for the sole and only purpose that the said stock may be pledged as collateral security for the payment of the said bonds, and with the distinct covenant and understanding on behalf of this company that when and as the stock of the Eastern Dynamite Company and of E. I. du Pont de Nemours and Company shall be returned to this company in accordance with the provisions of the said deed of trust that the same will be forthwith assigned and transferred unto the said T. Coleman du Pont, or his assigns,

AND WHEREAS, in the judgment of this Board the

said stock of the said companies is properly necessary for the business of this company and is with the services aforesaid worth the amount hereinafter agreed to be paid therefor.

THEREFORE BE IT RESOLVED, that this company do purchase from the said T. Coleman du Pont the said stock of the Laflin and Rand Powder Company, and do acquire the said stock of the Eastern Dynamite Company and of the said E. I. du Pont de Nemours and Company, for the purposes and subject to the conditions aforesaid, and do further compensate the said T. Coleman du Pont for obtaining the said contracts and for the services aforesaid, and do pay for such stock and services the sum of Six Million, Two Hundred and Seven Thousand Six Hundred Dollars to be paid as follows: Three Million Nine Hundred and Ninety-Eight Thousand Dollars in the full paid, non-assessable capital stock of this company, and two thousand two hundred and nine and six-tenths five per cent. collateral trust bonds each for One Thousand Dollars, to be secured by a collateral trust deed, or mortgage, pledging all of the stock purchased and acquired as aforesaid, the said bonds to run for twenty years, with the option on the part of this company of retiring the same, or any part thereof, at any interest bearing period upon giving sixty days' notice to the registered holder thereof if registered, and paying five per cent. premium thereon, and it being further stipulated in said deed of trust, or mortgage, that one hundred and twenty-four of said bonds shall be retired annually by lot at par, and that as the same are returned five shares of the capital stock of the Eastern Dynamite Company, or ten shares of the capital stock of the E. I. du Pont de Nemours and Company shall be surrendered and transferred to this Company for each of the said bonds so paid and retired.

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7984 *Plaintiff's Exhibit 1164*

BE IT FURTHER RESOLVED, that this company do purchase from the said T. Coleman du Pont when and as the same may be tendered to it, such further or additional shares of capital stock of the said Laflin & Rand Powder Company as he may be able to acquire, at the rate of Four Hundred Dollars per share, and that when so purchased the same shall be deposited with the Trustee, and that the said Trustee shall issue to this company one bond for each two and one-half shares of stock
7985 so purchased and placed as collateral with the said Trustee, which bonds, when delivered to this company, are to be used at the same rate for the purchase from the said T. Coleman du Pont of the said stock, said bonds so to be issued to be equally secured with the other bonds issued and secured by said deed of trust, or mortgage,

BE IT FURTHER RESOLVED, that the officers of this company be and they are hereby authorized and directed from time to time to take such steps as
7986 may be necessary to carry out the terms of this resolution."

Plaintiff's Exhibit 1169.

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(Government's Exhibit No. 152.)

The Directors of the Eastern Dynamite Company from time to time passed resolutions in substantially the following form under which they authorized the purchase of all the real, personal and mixed property of the following companies, for the amount set opposite each respective name:

Vol.	Page.	Company.	Amount.
1	108	The Atlantic Dynamite Co., N. J.	$1,217,920.10
1	109	Hercules Powder Co. of Del.	1,289,422.89
1	111	Repauno Manufacturing Co.	2,127,939.18
1	112	Hecla Dynamite Co.	10,454.79
1	113	Giant Manufacturing Co.	814,619.10
1	114	Acme Powder Co.	13,765.65
1	115	Sterling Dynamite Co.	146,842.24
1	117	Blue Ridge Powder Co.	4,780.93
1	117	Hudson River Powder Co.	3,377.53
1	118	Columbian Powder Co.	33,061.39
1	119	Atlantic Dynamite Co. of N. Y.	6,564.55
1	120	Repauno Chem. Co., N. Y.	10,641.60
1	121	Hercules Powder Co., N. Y.	2,680.05
1	122	Unique Powder Co.	1.00
1	123	Repauno Chem. Co., Del.	1,591,478.93
1	127	Oliver Dynamite Co.	70,494.86
1	128	Weldy Dynamite Co.	38,599.25
1	129	Clinton Dynamite Co.	33,359.37
1	139	Arthur Kirk & Son Co.	220,196.65
1	145	New York Powder Co. of N. J.	224,308.44
1	146	Producers Powder Co.	782,454.80

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7990 *Plaintiff's Exhibit 1169*

1	147	Brooklyn Glyc. Mfg. & Refining Co.....	113,575.29
1	148	Electric Exploder Co....	134,358.13
1	149	Atlantic Manufacturing Co.	165,432.06
1	150	Enterprise High Explosives Co.....	37,391.64
1	151	The Climax Powder Mfg. Co.	446,999.70
1	152	Forcite Powder Co. of N.	
7991		Y.	57,005.57
1	154	Forcite Powder Co. of N. J.	1,376,092.04
1	155	Joplin Powder Co.....	82,771.16
1	156	Explosives Supplies Co..	47,779.01
1	157	Hudson River Wood Pulp Mfg. Co.....	225,105.25
1	159	National Torpedo Co....	440,390.46
1	169	Standard Explosives Co., Ltd.	29,497.63
1	170	James Macbeth & Co....	156,834.89
7992 1	170	New York Powder Co....	1,000.00
1	172	H. Julius Smith Elec. Fuze Co.....	41,503.06

"Whereas certain negotiations have been pending between the officers of this company and the officers of the Company, which have resulted in an offer to sell to this company all the real, personal and mixed property of said Company wherever situate, including the good-will of the business of said company, and all letters-patent, trade marks, trade names, brands, processes and formulas, if any, of said company, for the sum of $, the book value thereof, as shown by the books of said company (date), to be hereafter ascertained by the Secretary and inserted herein; and

Plaintiff's Exhibit 1171 7993

WHEREAS, it is in the judgment of the Board for the best interests of this company to accept said offer and purchase said property and rights for the price aforesaid;

THEREFORE BE IT RESOLVED, that this company purchase from the
Company, all its real, personal and mixed property wherever situate, including the good-will of the business of said company, and all letters-patent, trade marks, trade names, brands, processes and formulas, if any, of said Company, and pay therefor the sum of $, the book value thereof, as shown by the books of said Company (date) to be hereafter ascertained by the Secretary of this company and inserted herein; and the officers of this company are hereby authorized to do all things necessary or incident to the completion of said purchase." 7994

Plaintiff's Exhibit 1171. 7995

(Government's Exhibit No. 154.)

Copy of Resolution of Board of Directors of The Eastern Dynamite Co.,

July 24th, '08.

Vol. 1 page 181.

"On motion of P. S. du Pont, duly seconded, the following resolution was unanimously adopted:

RESOLVED, That this company purchase from the Laflin & Rand Powder Company for the sum of $186,573.09 the following real and personal property at Newhall, Maine:

7996 *Plaintiff's Exhibit 1172*

Oriental Powder Mills, Plant Machnry.	$ 5,447.84
Water Power	133,618.00
Sebago Improvement Co. Stk	1,100.00
Plant Furniture, etc	297.25
Houses	19,560.00
Plant Real Estate	26,550.00
	$186,573.09

7997 **Plaintiff's Exhibit 1172.**

(Government's Exhibit No. 155.)

Copy of Resolution of the Directors of the The Eastern Dynamite Company,

July 10th, 1907.

Vol. 1, Page 196.

"WHEREAS, certain negotiations have been pending between the officers of this company and
7998 the officers of E. I. du Pont de Nemours Powder Company, a corporation, created and organized under the laws of New Jersey, which have resulted in a proposition to purchase all the real, personal and mixed property of this company, wherever situate, including the good will of its manufacturing business and all letters patent and interests in letter patent, trade marks, trade names, brands, processes and formulas; excepting and reserving to this company all the real and personal property of this company situate in Ulster County, New York, and all raw materials and finished products situate at the various manufacturing plants of this company and all cash and all accounts and bills receivable of this company as shown by its books on the 1st day of July, 1907, and to pay therefor Four

Million Four Hundred Thousand Dollars ($4,400,000) in the preferred capital stock of E. I. du Pont de Nemours Powder Company; and

WHEREAS, it is in the judgment of the Board of Directors of this company for the best interests of this company to accept said proposition and to sell to E. I. du Pont de Nemours Powder Company, all the real, personal and mixed property of this company, except as aforesaid, for the consideration aforesaid;

THEREFORE BE IT RESOLVED, that this 8000
company do sell to E. I. du Pont de Nemours Powder Company all the real, personal and mixed property of this company, wherever situate, including the good-will of its manufacturing business, and all letters patent and interests in letters patent, trade marks, trade names, brands, processes and formulas; excepting and reserving to this company all the real and personal property of this company situate in Ulster County, New York, known as the Hudson River Wood Pulp property and all raw materials and finished products situate at the various 8001
plants of this company and all cash and all accounts and bills receivable of this company as shown by its books on the 1st day of July, 1907, for the purchase price of Four Million Four Hundred Thousand Dollars ($4,400,000); possession of the property and assets so sold to be delivered to the purchaser on the delivery to this company of the stock so to be accepted in payment for the property so sold; and

BE IT RESOLVED, that upon the payment of the agreed purchase price for the property and assets so to be sold, the appropriate officers of this company execute and deliver to E. I. du Pont de Nemours Powder Company all necessary deeds, assignments and bills of sale to vest the title to the property so to be sold in the purchaser."

8002 **Plaintiff's Exhibit 1175.**

(Government's Exhibit No. 158.)

Vol. 1, Page 70.

"RESOLVED, That this company sell to E. I. du Pont de Nemours Powder Company, the following shares of stock at the values given:

	Shares.	Total Val. Stock.
8003 A. Kirk & Son Co.....	313	75,570.72
Climax Pdr. Mfg. Co.....	50	92.557.50
Rock Glycerine Co.....	250	4,702.50
Brooklyn Glyc. Co.	50	24,520.00
A. S. Speece Pdr. Mfg. Co.....	29	442.25
Robina Fuse Co.	25	4,526.00
H. Julius Smith Elec F. Co..	2	1,735.58
National Torpedo Co.....	34	17,803.08
	753	221,857.63

8004 AND BE IT FURTHER RESOLVED, That the proper officers of this company be and hereby are authorized to make and execute all necessary assignments and transfers of the said shares of stock."

Plaintiff's Exhibit 1176. 8005

(Government's Exhibit No. 159.)

COPY OF RESOLUTION OF THE DIRECTORS OF THE E. I. DU PONT COMPANY

August 2nd. 1904

Vol. 1, Page 82

"RESOLVED that a dividend of $1,750.00 per share be declared on the capital stock of this company, payable in cash and securities, as follows:— 8006

	Shares	Amount
Wilmington Trust Co.....	1850	92,500.00
Monarch Powder Co.....	73	7,300.00
A. Kirk & Sons Co.....	313	31,300.00
Climax Powder Mfg. Co.....	50	2,500.00
Robina Fuse Company.....	25	2,500.00
Brooklyn Glycerine Co.....	50	2,500.00
H. J. Smith Electric Fuse Company	2	200.00
Rock Glycerine Co.....	250	12,500.00
National Torpedo Co.....	34	3,400.00
duPont International Pdr. Co.	500.	16,666.67
The Northwest Coal Co.....	4 bonds	400.00
Cash		3,233.33
		$175,000.00

8007

8008 **Plaintiff's Exhibit 1177.**

(Government's Exhibit No. 160.)

The Directors of the E. I. duPont Company (Delaware) from time to time passed resolutions in substantially the following form under which they authorized the purchase of all of the real, personal and mixed property of the following companies, for the amount set opposite each respective name:—

	Vol.	Page	Company	Amount
8009	1	84	H. A, Weldy Powder Company	$323,714.93
	1	90	Ohio Powder Company....	299,078.80
	1	91	Shenandoah Powder Company	75,511.73
	1,	92	Birmingham Powder Company	80,135.73
	1,	93	Chattanooga Powder Company	293,840.04
	1,	94	Mahoning Powder Company	228,779.58
	1,	97	Lake Superior Powder Company	985,618.39
8010	1,	124	Phoenix Powder Manufacturing Co.....	629,572.45

WHEREAS, certain negotiations have been pending between the officers of this company and the officers of the Company, which have resulted in an offer to sell to this company, all the real, personal and mixed property of said Company, wherever situate, including the good-will of the business of said company, and all letters-patent, trade marks, trade names, brands, processes and formulas, if any, of said Company, for the sum of

Plaintiff's Exhibit 1177 8011

Dollars, the book value thereof, as shown by the books of said company (date) to be hereafter ascertained by the Secretary of this company and inserted herein; and

WHEREAS it is in the judgment of the Board for the best interests of this company to accept said offer and purchase said property and rights for the price aforesaid.

THEREFORE BE IT RESOLVED that this 8012
company purchase from the Company, all its real, personal, and mixed property, wherever situate, including the good-will of the business of said company, and all letters-patent, trade marks, trade names, brands, processes and formulas, if any, of said Company, and pay therefore the sum of Dollars, the book value thereof, as shown by the books of the said Company, (date to be hereafter ascertained by the Secretary of this company and inserted herein; and the 8013
officers of this company are hereby authorized to do all things necessary or incident to the completion of said purchase."

8014 **Plaintiff's Exhibit 1185.**

(Government's Exhibit No. 168.)

COPY OF RESOLUTION OF THE DIRECTORS OF THE E. I. DUPONT DE NEMOURS AND COMPANY,

Feb. 28th, 1902.

Vol. 1, Page 20.

8015 "WHEREAS, a proposition has been made to this company by E. I. duPont de Nemours and Company a corporation existing under the laws of the State of Delaware, to sell to this company all of the property, assets and good-will of the said E. I. duPont de Nemours and Company for the sum of Twenty-three Million Nine Hundred and Ninety-seven Thousand and Nine Hundred Dollars, of which amount Eleven Million Nine Hundred and Ninety-seven Thousand Nine Hundred Dollars is to be paid in the full paid, non-assessable capital
8016 stock of this company at par, and the remaining twelve Million Dollars in the obligations of this company in such form, amount, and for such period, and at such times, as may be determined upon by the Board of Directors of the said E. I. duPont de Nemours and Company.

AND WHEREAS, in the judgment of this Board the said property, assets and good will are necessary for the business of this company, and are of the value of Twenty three Million Nine Hundred and Ninety-seven Thousand Nine Hundred Dollars.

AND WHEREAS, the following form of obligation has been approved by the said Board, and is now approved by this Board

Plaintiff's Exhibit 1185 8017

(Here follows form of purchase note.)

NOW THEREFORE BE IT RESOLVED, That this corporation do accept the said proposition, and do purchase from the said E. I. duPont de Nemours and Company all of its property, assets and good will whether standing in the name of the said company, or in the name of any individual, or individuals, subject to the payment of all the debts and liabilities of the said company as they may be shown to exist on the first day of March, A.D. 1902, for 8018
the said sum of Twenty Three Million Nine Hundred and Ninety Seven Thousand Nine Hundred Dollars, to be paid for by this company as follows: Eleven Million Nine Hundred and Ninety Seven Thousand Nine Hundred Dollars in the full paid, non-assessable capital stock of this company at par, to be issued to the said E. I. duPont de Nemours and Company by certificates for such number of shares as the President of said company may designate, and the remaining sum of Twelve Million Dollars to be paid in the promissory notes of this 8019
company in the form aforesaid.

BE IT FURTHER RESOLVED, That the officers of this company be and they are hereby authorized and directed to carry out this resolution, and upon the transfer and assignment to this Company of the said property, assets and good-will of the said E. I. duPont de Nemours and Company to issue the said stock and deliver the said notes to the said E. I. du Pont de Nemours and Company, as and when said property, assets and good-will may be delivered to this company."

8020 **Plaintiff's Exhibit 1187.**

(Government's Exhibit No. 170.)

COPY OF RESOLUTION OF BOARD OF DIRECTORS OF THE E. I. DUPONT DE NEMOURS & COMPANY

Oct. 24th, '03.

Vol. 1, Page 173 (174)

8021 "WHEREAS, offers to purchase the stock of certain Powder Companies, to wit:—

Ohio Powder Co., Equitable Powder Co., Oriental Powder Mills, Enterprise Powder Co., Judson Powder Co., E. I. duPont Co., Hazard Powder Company, Laflin & Rand Powder Company, Ferndale Powder Co., Fairmont Powder Co., Austin Powder Co., Eastern Dynamite Co., Consumers Powder Co., H. A. Weldy Co., Monarch Powder Co., American Storage & Delivery Co., Marcellus Powder Co., Mahoning Powder Co., Lake Superior Powder Co.,
8022 Shenandoah Powder Co., Phoenix Powder Co., Birmingham Powder Co., Laflin Powder Manufacturing Co., Chattanooga Powder Co., Indiana Powder Co., Northwestern Powder Co., King Mercantile Co., Moosic Powder Co., California Powder Works, Delaware Securities Co. has been made by the Board of Directors of E. I. duPont de Nemours Powder Company giving in exchange therefor, securities of E. I. duPont de Nemours Powder Company in accordance with resolutions of Board of Directors of said Company, and

WHEREAS E. I. duPont de Nemours Powder Company is to pay for these several stocks an amount equal to ninety-five (95%) per cent of their

true value as may be fixed by the Board of Directors of the said E. I. duPont de Nemours Powder Company by an appraisal now being made, and

WHEREAS, the value has not yet been accurately determined, but estimated, said Board of Directors of E. I. duPont de Nemours Powder Company cannot in consequence at this time accurately fix the true values.

NOW THEREFORE BE IT RESOLVED, That 8024
this company purchase from the holders of shares of the Capital Stock of the said Powder Companies as many of the said shares as possible and pay on account of such purchase in full paid non-assessable preferred and Common Stock of E. I. duPont de Nemours Powder Company ninety-five (95%) per cent. of their values as may be approximately determined by the said Board of Directors of E. I. duPont de Nemours Powder Company.

AND IT IS FURTHER RESOLVED, That in 8025
as much as the true value of said securities has not yet been determined but is being determined by appraisement, and said appraisement being not at this time completed, the officers of this company be, and they hereby are empowered and authorized to execute and deliver to the holders of stocks of the companies enumerated above who deposit same with us, an adjustment certificate (as per form attached) entitling the holders thereof, or his nominee, such further sum, if any, for each share as the Board of Directors of E. I. duPont de Nemours Powder Company shall hereafter determine based on above appraisal such shares to be fairly worth over and above the estimated amount originally paid; said further payment to be made in fully paid non-as-

8026 *Plaintiff's Exhibit 1204*

sessable shares of said E. I. duPont de Nemours Powder Company and to be issued after such determination is made and upon surrender of this certificate.

AND BE IT FURTHER RESOLVED, that the officers of this company be empowered to execute the attached agreement with the Wilmington Trust Company to act as Trustee for us in the exchange of these securities."

8027 (here follows form of Adjustment Certificate and Agreement).

Plaintiff's Exhibit 1204.

(Government's Exhibit No. 187.)

Copy of Resolution of the Board of Directors of E. I. duPont deNemours Powder Company,

8028 (July 12, 1907)

The Eastern Dynamite Company

C Vol. 2, Page 90.

"WHEREAS, certain negotiations have been pending between the officers of this company and the officers of the The Eastern Dynamite Company, a corporation created and organized under the laws of New Jersey, which have resulted in a proposition to sell to this company, all of the real, personal and mixed property of the The Eastern Dynamite Company, wherever situate, including the good-will of the manufacturing business of said company, and all letters patent and interests in let-

8029

ters patent, trade marks, trade names, brands, processes and formulas, excepting and reserving to said The Eastern Dynamite Company its real and personal property situate in Ulster County, New York, known as the Hudson River Wood Pulp property, and all raw materials and finished products, situate at the various plants of said company, and all cash and all accounts and bills receivable of said company, as shown by its books on the first day of July, 1907, and to accept in payment therefor forty-four thousand (44,000) shares of the preferred capital stock of this company of the par value of Four Million, Four Hundred Thousand Dollars ($4,400,000); and

8030

WHEREAS, said property is, in the judgment of this Board of the reasonable value of Four Million, Four Hundred Thousand Dollars ($4,400,000); and desirable for use in the business of this company, and that it is for the best interests of this company to accept said proposition and purchase said property for the consideration aforesaid;

8031

THEREFORE, BE IT RESOLVED, That this company do purchase from the The Eastern Dynamite Company, all of its real, personal and mixed property, wherever situate, including the good-will of its manufacturing business, and all letters patent and interests in letters-patent, trade names, brands, processes and formulas, excepting and excluding from the real, personal and mixed property aforesaid all the real and personal property of the The Eastern Dynamite Company, situate in Ulster County, New York, known as the Hudson River Wood Pulp property, and all raw materials and finished products at the various plants of said the

8032 *Plaintiff's Exhibit 1205*

The Eastern Dynamite Company, and all cash and all accounts and bills receivable of said company, as shown by its books on the first day of July, 1907, and deliver in payment therefor to The Eastern Dynamite Company forty-four thousand (44,000) shares of the preferred capital stock of this company of the par value of Four Million, Four Hundred Thousand Dollars ($4,400,000) upon possession of the property so to be sold, being delivered to this company; and

8033

BE IT FURTHER RESOLVED, that the appropriate officers of this company are hereby authorized and directed to deliver to the The Eastern Dynamite Company forty-four thousand (44,000) shares of preferred stock of this company in payment of the property so purchased, upon possession thereof being delivered to this company, and to take all further and necessary action to consummate the purchase of and payment for said property."

8034

Plaintiff's Exhibit 1205.

(Government's Exhibit No. 188.)

The Directors of the E. I. duPont deNemours Powder Company from time to time passed resolutions in substantially the following form under which they authorized the purchase of the stocks of the following companies, issuing in payment for each share of said stock of said companies their Preferred and Common Stock in par value equal to the amount set opposite the respective stock, as follows:—

For each share of stock of the				There was authorized to be issued in payment therefor stock of E. I. duPont de Nemours Powder Company, as follows: Pfd. Stk.	Com. Stk.	
Vol. 1, Page	211	American Storage & Delivery Co.		$232.292	$915.52	
" "	111	Austin Powder Company.....		1098.03	274.78	8036
" "	112	Birmingham Powder Company.		166.71	273.17	
" "	114	Chattanooga Powder Company.		137.27	162.24	
" "	190	Conemaugh Powder Co.....			101.89	
" "	115	California Investment Company			51.975	
" "	97	California Powder Works.....		144.1123	96.9639	
" "	(99) 87	California Vigorit Pdr. Co.....		3.83	4.90	
" "	118	Delaware Securities Company..		81.44	152.66	
" "	116	E.I. duPont deNemours Co. of Pa.		145.181	146.85	
" "	120	Eastern Dynamite Co.....		336.91	465.83	
" "	133	Globe Powder Co.....		2.2641		
" "	121	Indiana Powder Co.....		159.88	332.32	
" "	123	Lake Superior Powder Co.....		149.10	214.92	
" "	136	Laflin & Rand Powder Co.....		764.771	604.049	
" "	89	Manufacturers Con. Co.....		68.7827	195.0566	8037
" "	135	Monarch Powder Co.....		33.712		
" "	124	North Western Pdr. Co.....		153.06	137.86	
" "	126	Oriental Powder Mills.....		177.56	50.16	
" "	128	Ohio Powder Co.....		207.87	390.78	
" "	129	Phoenix Pdr. Mfg. Co.....		24.68	29.48	
" "	103	H. A. Weldy Pdr. Co.....	1,5817.			

All of the above stock was issued in accordance with resolutions of the Board of Directors of this company, all of which resolutions were in form substantially as follows:

WHEREAS, this company owns certain shares of the capital stock of the Company and in the judgment of this Board, it is for the best interests of the Company to acquire as many more shares of such stock as may be;

8038 *Plaintiff's Exhibit 1205*

AND WHEREAS, this board has made a careful investigation of the value of the said stock, and has determined that each share of the capital stock of the said company, was on August first, nineteen hundred and three of the fair value of

NOW THEREFORE, BE IT RESOLVED, that this company do purchase from E. I. du Pont de Nemours and Company as many shares of the capital stock of the said company as may be offered
8039 for sale upon the terms and conditions hereinafter mentioned, and that it do pay for each share of the said stock par value, being shares of the full-paid and non-assessable preferred stock of this company, and par value, being shares of the full-paid and non-assessable common stock of this company to E. I. du Pont de Nemours and Company, or said stock may be issued in the names of such persons and in such amount as may be directed by the Wilmington Trust Company, which direction may be made by a
8040 letter to the transfer agent, registrar and officers of this company, signed by the President, Vice-President or Treasurer of the said Wilmington Trust Company, with which said Wilmington Trust Company the said E. I. du Pont de Nemours and Company has caused or will cause the shares of stock of the said Company to be deposited for the purpose of effecting the purchase herein provided for;

BE IT FURTHER RESOLVED, that in addition to the above purchase price to be paid in stock of this company, as herein provided, this company do pay to the persons receiving the preferred stock of this company, issued in accordance with this resolution, an amount in cash equal to interest on the

preferred stock of this company, so issued at the rate of Five Per Centum per annum from the First day of August, nineteen hundred and three, to the date of the issue of the preferred stock of this company in accordance with this resolution;

PROVIDED, HOWEVER, that there shall be deducted from such payment the amount of any dividend which shall have been declared and paid upon the said stock of the Company since the First day of August, nineteen hundred and three;

BE IT FURTHER RESOLVED, that the officers of this company be and they are hereby authorized to issue the stock herein provided for and to cause the same to be properly issued and registered;

AND BE IT FURTHER RESOLVED, that any previous resolution or resolutions of this Board be and hereby are rescinded and annulled in so far as the same are inconsistent herewith.

8044 **Plaintiff's Exhibit 1305.**

THIS CONTRACT, made by and between The Buckeye Powder Company, of Peoria, Ill., first party, and New York Coal Company, of Columbus, Ohio, second party.

WITNESSETH: That first party hereby sells and second party buys all the black blasting powder in kegs of 25 pounds each, required for use in the mines owned or controlled by second party, or that it may desire to sell in the district named
8045 below, for the period of two years from this date, at $1.10 per keg. The following conditions are mutually accepted.

(A) First party agrees to allow second party the actual car load freight charges from shipping to delivery point.

(B) Terms are 60 days or 2% discount for cash, if remitted within 10 days from date of invoice.

(C) Second party agrees to buy from first party
8046 in car loads lots of 800 kegs each all the black blasting powder required by it for the following mines:

"Shafer" Mine at Floodwood, Ohio.
"Section 31" Mine at Buchtel, Ohio.

or for any other mines that may be acquired by the second party in the same district during the time of this contract.

(D) First party hereby guarantees the price of $1.10 per keg delivered against bona fide offers by others. Should a lower price be named party of the second part first party may elect to meet the lower price, otherwise second party is at liberty

to purchase from others until such time as first party meets the lower price.

(E) First party may furnish and the second party will accept under this contract powder of any standard brand make or quality.

(F) The first party is not to be responsible for any delays caused by strikes, accidents or causes beyond its control.

8048

Dated at Columbus, Ohio, this 21st day of July, 1904.

THE BUCKEYE POWDER COMPANY,
By R. S. Waddell,
President.

NEW YORK COAL COMPANY,
By E. W. Poston,
President.

8049

Plaintiff's Exhibit 1306.

THIS CONTRACT, made between the BUCKEYE POWDER COMPANY, of Peoria, Illinois, first party, and the NORTHWESTERN COAL & MINING COMPANY, of Bevier, Missouri, second party.

WITNESSETH: That first party hereby sells, and second party buys, all the black blasting powder in kegs twenty-five (25) pounds each, required for its use and for sale by second party to others, for the period of one year (1) from this date, at the net carload price of 800 kegs or over, of $1.04 per keg delivered at Bevier, Missouri, including all

8050 *Plaintiff's Exhibit 1306*

other mines in that vicinity that may be acquired by the party of second part, during the life of this contract.

The above price is guaranteed against any lower price made on Buckeye powder in the same district. Should a better price be made by other reputable powder companies to party of second part, and should party of first part decline to meet such lower price, party of second part shall be at liberty to purchase from said other company until such
8051 time as party of first part may elect to accept the lower price, when purchases shall be resumed under this contract.

The option is hereby given party of second part for a renewal of this contract and under same terms and conditions, for an additional year provided that at least thirty days written notice be given by party of second part prior to the expiration of the first year.

8052 The quality of the powder to be supplied under this contract is guaranteed to be fully up to standard and of same grade as heretofore furnished by party of first part.

Terms of payment under this contract are sixty days from date of invoice, subject to cash discount of two (2) per cent within ten days.

First party may furnish and second party will accept under this contract, powder of any standard brand, make and quality.

First party is not to be responsible for delays caused by strikes, accidents or causes beyond its control.

Signed in duplicate at Peoria, Illinois, this 20th day of May, 1905.
(First party)

BUCKEYE POWDER COMPANY,
By R. S. Waddell, President.

(Second party)

NORTHWESTERN COAL & MINING COMPANY, 8054
By C. G. Thurston, Treasurer.

(SEAL)

Plaintiff's Exhibit 1307.

MEMORANDUM OF AGREEMENT.

MEMORANDUM OF AGREEMENT entered into this first day of June, 1905, between the BUCKEYE POWDER COMPANY, party of the first part, and the WHITEBREAST FUEL COMPANY 8055
of Illinois, party of the second part.

The party of the first part hereby sells and the party of the second part hereby purchases all its supply of black blasting powder for the mines of the party of the second part located at:

Dunfermline, Illinois.
Cardiff, Illinois.
Cleveland, Iowa.
Pekay, Iowa.
Hilton, Iowa.

for one year from June 1, 1905, at price of ninety-two cents (92c) per keg of 25 pounds each f. o. b. cars Edwards, Illinois.

TERMS, 60 days net or two per cent 2%) discount for cash in 10 days from date of invoice.

DELIVERIES, are to be made in carload lots of not less than 800 kegs.

WHITEBREAST FUEL CO. OF ILLINOIS,
By C. V. Shelft, Vice Prest.
BUCKEYE POWDER CO.,
By John G. Miller, Agent.

8057 This contract covers
supply of powder
for Cardiff Coal Co.
Cardiff, Ill.
Chicago, June 1, 1905.
J. G. M.

Plaintiff's Exhibit 1309.

8058 THIS CONTRACT entered into this 23rd day of February, 1907, by and between the BUCKEYE POWDER COMPANY, a corporation of PEORIA, ILLINOIS, party of the first part, and THE UNITED STATES GYPSUM COMPANY, of CHICAGO, ILLINOIS, party of the second part;

WITNESSETH:—

(1) That the party of the first part hereby sells and the party of the second part hereby purchases all of the Blasting Powder ordered by the party of the second part within one year from date, for use in its operations at:

FORT DODGE, IOWA.

At the price of .98 per keg of 25 lbs. each, deliv-

8059

ered f. o. b. Fort Dodge, in carloads of eight hundred (800) kegs; if delivered in smaller lots, this price to prevail plus the increase of freight charges if any there is.

(3) Deliveries to be made from time to time as ordered by the second party, all goods to be of equal and uniform quality as sample of ten (10) kegs shipped on order No. 24144, and powder guaranteed at all times satisfactory to said second party.

Terms: Sixty (60) days, or two per cent (2%) discount within ten days (10) from date of invoice. 8060

(4) The party of the first part is not to be responsible for delays caused by strikes, accidents, or other causes beyond its control.

(5) Terms of this agreement to be obligatory and binding upon both parties hereto, their successors, legal representatives or assigns.

UNITED STATES GYPSUM COMPANY

By S. R. Fulton, 1st V. Prest. 8061

BUCKEYE POWDER COMPANY

By R. S. Waddell, Prest.

(SEAL)

8062 **Plaintiff's Exhibit 1310.**

MEMORANDUM OF AGREEMENT, entered into this 1st day of February, 1904, by and between the Buckeye Powder Company, party of the first part, and The Wear Coal Company, party of the second part, WITNESSETH:

Party of the first part hereby sells and party of the second part hereby purchases all the blasting powder required for its use in the mines in which second party is interested at Huntsville and Bevier, Missouri, for one year from the above date, or until
8063 February 1, 1905, at the following prices and upon the following terms:

Price—One Dollar and sixteen cents ($1.16) per keg, of twenty-five (25) pounds each, delivered as ordered at Huntsville and Bevier, Missouri.

Terms—The acceptance of party of the second part at sixty (60) days from date of invoices of the party of the first part, after deducting the amount of freight charges from point of shipment to destination.

It is also understood that in the event party of
8064 the second part should use powder in carload lots on the Missouri Pacific Railroad tracks at St. Louis, the price is to be one dollar thirteen cents ($1.13) per keg F.O.B. cars Missouri Pacific tracks St. Louis, same terms of payment as above.

This contract is to cover an annual consumption of, approximately, thirty thousand (30,000) kegs.

It is further understood that the party of the first part guarantees that the quality of the powder to be delivered under this contract shall be equal to that purchased by any of the regular or standard companies, and satisfactory to the miners of the party of the second part; and if demands are made for other brands of powder by the miners of the party of the second part, the party of the first part will furnish such other brands, or will permit party

of the second part to purchase same until the miners of the party of second part can be prevailed upon to return to the use of the powder of the party of the first part.

Witness our hands this the date above written.

BUCKEYE POWDER COMPANY
By R. S. Waddell.
THE WEAR COAL COMPANY
By F. E. WEAR, President. 8066

Plaintiff's Exhibit 1311.

THIS CONTRACT, made between the BUCKEYE POWDER COMPANY of Peoria, Illinois, first party, and the RANDOLPH-MACON COAL COMPANY, principal office Huntsville, Missouri, second party.

8067

WITNESSETH: That first party hereby sells, and second party buys, all the black blasting powder, in kegs twenty-five (25) pounds each, required for its use and for sale by second party to associate companies, for the period of one (1) year from this date, at the net carload price of 800 kegs or over, of $1.04 per keg delivered to Huntsville, Bevier, Renick, Yates, Higbee, and Elliott, Missouri, including all other mines in vicinity of these places, that may be acquired by the party of second part during the life of this contract.

The above price is guaranteed against any lower price made on Buckeye powder in the same district. Should a better price be made by other reputable powder companies to party of second part, and should party of first part decline to meet such

8068 *Plaintiff's Exhibit 1311*

lower price, party of the second party shall be at liberty to purchase from said other company until such time as party of first part may elect to accept the lower price, when purchases shall be resumed under this contract.

The option is hereby given party of second part for a renewal of this contract and under same terms and conditions, for an additional year provided that at least thirty days written notice be given by party of second part prior to the expiration of the
8069 first year.

The quality of the powder to be supplied under this contract is guaranteed to be fully up to standard and of same grade as heretofore furnished by party of first part.

Terms of payment under this contract are sixty days from date of invoice, subject to cash discount of two (2) per cent within fifteen days.

First party may furnish and second party will accept under this contract, powder of any stand-
8070 ard brand, make and quality.

First party is not to be responsible for delays caused by strikes, accidents or causes beyond its control.

Signed in duplicate at Peoria, Illinois, this 12th day of May, 1905.

(First part)

BUCKEYE POWDER COMPANY,
By R. S. Waddell, Prest.

(Second party)
RANDOLPH-MACON COAL COMPANY,
(SEAL) By M. E. Minlin, Gen. Mngr.

Plaintiff's Exhibit 1312. 8071

AGREEMENT made this thirty-first day of May, 1904, between the BUCKEYE POWDER COMPANY, of Peoria, Illinois, party of the first part, and C. G. BRECHNITZ, of Belleville, Illinois, second party.

WITNESSETH: The party of the first part, hereby appoints the party of the second part, its net price agent for the sale of its product at Belleville, Illinois, for the term of two (2) years from June 1, 1904. 8072

The party of the first part hereby agrees to sell, and the party of the second part, buys all the BLACK BLASTING POWDER, not exceeding 25,000 kegs per year, that may be ordered by party of the second part, for delivery to himself and the following customers, whose trade is hereby set apart and reserved for party of second part.

The price of said powder to be $1.15 per keg, delivered in carloads of 800 kegs at Belleville, Illinois, and mine location of parties named. Bills subject to 2% discount for cash in ten (10) days from date of invoice. The following is the list of reserved customers: 8073

Name.	Location.
D. Zihlsdorf,	Marissa, Ill.
L. D. Jones,	Coulterville, Ill.
Johnson Coal Company,	Lenzburg, Ill.
Tirre Coal & Mining Co.,	Lenzburg, Ill.
Kolb Coal Company,	Mascoutah, Ill.
Illinois & Missouri Coal Co.,	St. Louis, Md.
Glendale Coal Mining Company,	Belleville, Ill.
Suburban Coal & Mining Co.,	Belleville, Ill.
Superior Coal & Mining Co.,	Belleville, Ill.
Enterprise Mining Co.,	

8074 *Plaintiff's Exhibit 1312*

Rentchler Sta.,	St. Clair Co., Ill.
Walnut Hill Coal Co.,	St. Louis, Mo.
Oak Hill Coal Co.,	Belleville, Ill.
Lenz Coal & Mining Co.,	Belleville, Ill.
Germantown Coal & Mining Co.,	Germantown, Ill.
Valley Coal & Mining Co.,	St. Louis, Mo.
Royal Coal & Mining Co.,	Belleville, Ill.
Summit Coal & Mining Co.,	Belleville, Ill.
Wm. Ratican,	St. Louis, Mo.
8075 Horn Coal & Mining Co.,	Belleville, Ill.
Highland Coal Company,	Belleville, Ill.
Belleville & O'Fallon Coal Co.,	Belleville, Ill.
St. Louis & O'Fallon Coal Co.,	Belleville, Ill.
Roseborough Coal Company,	Percy, Ill.
S. B. Eaton & Co.,	DuQuoin, Ill.
Jupiter Coal Company,	DuQuoin, Ill.
Humbolt Coal Company,	Belleville, Ill.
Crown Coal Company,	St. Louis, Mo.
Muren Coal Company,	Belleville, Ill.
A. P. Murray,	Nashville, Ill.
8076 Little Muddy Coal Company,	DuQuoin, Ill.

Should party of the second part desire that contracts of standard form be made direct between first party and either or all of said customers at prices exceeding the net price to party of second part, such contracts will be executed between party of first part and said customers and for account of party of second part, and the excess above said net price shall be allowed to party of second part.

All powder under this contract to be purchased and invoiced by party of second part. In witness hereto parties have affirmed their names and seals this 31st day of May, 1904.

BUCKEYE POWDER COMPANY,
By R. S. Waddell, Prest.
(SEAL) C. G. Brechnitz.

Plaintiff's Exhibit 1313. 8077

THIS CONTRACT, made between the BUCKEYE POWDER COMPANY, of Peoria, Illinois, first party, and CHAS. F. KEELER COAL COMPANY, of Chicago, Illinois, second party.

WITNESSETH: That first party hereby sells, and second party buys, all the black blasting powder, in carloads of seven hundred and fifty (750) kegs or over, required for use in mines owned or controlled by second party as noted below, for a period of one (1) year from this date, at one dollar and ten cents ($1.10) per keg, delivered at Atherton, Indiana. 8078

THE TERMS are that the powder should be paid for monthly as consumed or sold.

Second party agrees to buy from first party in carload lots of seven hundred fifty (750) kegs or over.

This CONTRACT to also cover Powder for any other mines that might be acquired by the second party in the same locality, during the term of this contract. 8079

The first party may furnish, and the second party will accept under this contract, powder of any standard brand, make or quality.

The first party is not to be responsible for delays caused by strikes, accidents or causes beyond its control.

Dated at Peoria, Illinois, January 11th, 1905.

By
BUCKEYE POWDER COMPANY,
By R. S. Waddell, Prest.
CHAS. F. KEELER COAL COMPANY,
By Chas. F. Keeler.

8080 **Plaintiff's Exhibit 1314.**

THIS CONTRACT, made between the BUCKEYE POWDER COMPANY, of Peoria, Illinois, first party, and the GREAT NORTHERN FUEL COMPANY, principal office Kansas City, Missouri, second party.

WITNESSETH: That first party hereby sells, and second party buys, all the Black Blasting Powder, in kegs twenty-five (25) pounds each required for its use in mines located at Billy's Creek, Davis Creek, in Chariton Valley, Spring Valley, in the
8081 vicinity of Novinger, Missouri, for a period of three (3) years from this date, at the net carload price in carloads of 800 kegs or over, at $1.15 per keg delivered at Kansas City, Missouri, or Novinger, Mo.

This contract also covers supplies in carloads at all other mines that may be acquired by party of second part during the life of this contract.

The quality of the powder to be supplied under this contract, is guaranteed to be fully up to standard and of same grade as heretofore furnished by party of first part.

Terms of payment for all powder delivered under
8082 this contract, are sixty (60) days from date of invoice, subject to cash discount of two (2) per cent, in ten (10) days.

First party may furnish and second party will accept under this contract, powder of any standard brand, make and quality.

First party is not to be responsible for delays caused by strikes, accidents or causes beyond its control.

(First Party)

Signed in duplicate at Peoria, Illinois, this 25th day of May, 1905.

BUCKEYE POWDER COMPANY,

By R. S. Waddell, Prest.

(Second Party)

GREAT NORTHERN FUEL COMPANY,

(SEAL). By W. S. McCoull, President.

Plaintiff's Exhibit 1315. 8083

THIS CONTRACT, made between the BUCKEYE POWDER COMPANY, OF PEORIA, ILLINOIS, first party, and the WILLIS COAL MINING COMPANY and its successors, of ST. LOUIS, MISSOURI, second party.

WITNESSETH: That first party hereby sells and second party buys all the BLACK BLASTING POWDER required for use in the mines owned and controlled by the second party; also all the powder it may sell to other mines between E. St. Louis and Murphysboro on Mobile & Ohio Railroad; E. St. Louis, De Quoin and Cartersville, on Illinois Central Railroad; also on Southern Railroad between E. St. Louis and New Baden, Ill., on Louisville & Nashville Road, between E. St. Louis and Mt. Vernon, Ill. The net price for said powder to be One Dollar and ($1.10) Ten Cents per keg, subject to actual freight allowance on carloads. All sales and all contracts between the BUCKEYE POWDER COMPANY and other coal companies, payment for which is guaranteed by WILLIS COAL & MINING COMPANY, this contract governs absolutely. Other contracts submitted by WILLIS COAL & MINING COMPANY, to be made between other coal companies and BUCKEYE POWDER COMPANY, are subject to approval and acceptance by the BUCKEYE POWDER COMPANY. This contract to remain in force for the period of two years. Deliveries of powder under same to be made in carloads Eight Hundred (800) kegs or over at railroad stations in district named, freight on all shipments to be paid by consignee and amount deducted from invoices. This contract is to cover a maximum quantity of Thirty-five Thousand (35,000) kegs per year. 8084 8085

First party may furnish and second party will

8086 *Plaintiff's Exhibit 1315*

accept under this contract, powder of any standard brand, make and quality.

The first party is not responsible for delays caused by strikes, accidents or causes beyond its control.

The terms of payment for said powder: The WILLIS COAL & MINING COMPANY to send its acceptance on receipt of invoice for powder and bear-
8087 ing same date, payable in sixty (60) days thereafter for the amount of each invoice, less the actual freight charges paid. All invoices may be discounted at 2% for cash in ten (10) days from date of same, at the option of the WILLIS COAL MINING COMPANY.

Dated at St. Louis, Mo., this thirty-first day of May, 1904.

BUCKEYE POWDER CO.,
By R. S. Waddell, Prest.

8088

THE WILLIS COAL & MINING CO.,
By E. J. Krause, Prest.

(SEAL).

Plaintiff's Exhibit 1316. 8089

THIS CONTRACT, made between the BUCKEYE POWDER COMPANY, of Peoria, Illinois, first party, and THE NORTHWESTERN COAL & MINING CO., of Bevier, Missouri, second party.

WITNESSETH: That first party hereby sells, and second party buys, all the Black Blasting Powder, in kegs twenty-five (25) pounds each, required for use in the mines owned or controlled by second party as noted below, for the period of one year from this date, at $1.17 per keg.

The following conditions are mutually accepted: 8090

(A) First party agrees to allow second party the actual carload freight charges from shipping to delivery point.

(B) Terms are 60 days, or two per cent (2%) discount for cash if remitted within ten (10) days from date of invoice.

(C) Second party agrees to buy from first party in carload lots of 800 kegs of 25 lbs. each, all the Black Blasting Powder required by it for the following mines: 8091

Name.	Location.
Northwestern C. & M. Co., Mines Nos. 8 and 9.	Bevier, Mo.

(Should the miners or the Local Union condemn or refuse to use the powder furnished under this contract, the party of the second part shall be released from all obligations under said contract.)

or for any other mines that may be acquired by the second party, in the same district, during the time of this contract.

(D) The first party may furnish, and the second party will accept under this contract, powder of any standard brand, make and quality.

8092 *Plaintiff's Exhibits 1316, 1317*

(E) The first party is not to be responsible for delays caused by strikes, accidents, or causes beyond its control.

Dated at Peoria, Ill, June 4, 1904.

NORTHWESTERN COAL & MINING CO.
By C. G. Thurston.

BUCKEYE POWDER COMPANY,
8093 By R. S. Waddell, Prest.
(SEAL)

Plaintiff's Exhibit 1317.

THIS CONTRACT, made between the BUCKEYE POWDER COMPANY of Peoria, Illinois, first party, and the DE CAMP COAL MINING COMPANY of Illinois, office of St. Louis, Missouri, second party.

8094 WITNESSETH: That first party hereby sells, and second party buys, all the Black Blasting Powder, in kegs twenty-five (25) pounds each, required for its use, for the period of three (3) years from this date, at the net carload price of 800 kegs or over, of $1.05 per keg delivered at mine of said Company near Staunton, Illinois, including all other mines in that vicinity that may be acquired by the party of second part during the life of this contract.

The quality of the Powder to be supplied under this contract is guaranteed to be fully up to standard and of same grade as heretofore furnished by party of first part.

Terms of Payment for all Powder delivered under this contract, are sixty (60) days from date of

Plaintiff's Exhibit 1317

invoice, subject to cash discount of two (2) per cent in ten (10) days. 8095

First party may furnish and second party will accept under this contract, Powder of any standard brand, make and quality.

First party is not to be responsible for delays caused by strikes, accidents or causes beyond its control.

Signed in duplicate at Peoria, Illinois this 8th day of June, 1905. 8096

(First Party)

BUCKEYE POWDER COMPANY,
By R. S. Waddell, Prest.

(Second Party)

DE CAMP COAL MINING COMPANY,
By F. R. Johnson, Secty. and Gen. Mgr.
(SEAL)

8097

Plaintiff's Exhibit 1125.

DYNAMITE.

CAPACITIES OF AND NUMBER OF LBS. OUTPUT OF ALL DU PONT DYNAMITE MILLS DURING THE YEARS 1903 TO 1908 INCLUSIVE.

Thousands Only. Hundreds Omitted.

NAME	LOCATION	STARTED TO MFGR.	1903 CAPACITY	1903 OUTPUT	1904 CAPACITY	1904 OUTPUT	1905 CAPACITY	1905 OUTPUT	1906 CAPACITY	1906 OUTPUT	1907 CAPACITY	1907 OUTPUT	1908 CAPACITY	1908 OUTPUT
Ashburn	Ashburn, Mo.	Prior to Jan., 1903	...	12,518	13,860	13,351	13,860	15,201	15,000	12,819	15,000	16,103	15,000	13,239
Barksdale	Barksdale, Wis.	June, 1905	...	...	...	...	8,663	4,928	19,500	14,087	24,000	18,827	24,000	21,844
Emporium	Emporium, Pa.	Prior to Jan., 1903	...	7,452	6,930	4,653	6,930	4,596	7,800	7,797	8,100	7,183	8,100	6,848
Enterprise	Nasequehoning, Pa.	Prior to Jan., 1903	...	1,251	1,485	784	1,485	1,263	1,500	1,744	1,800	1,838	...	...
Forcite	Landing, N. J.	Prior to Jan., 1903	...	9,179	9,900	8,027	9,900	6,001	9,000	9,425	9,600	8,860	9,600	9,769
Hartford City	Hartford City, Ind.	July, 1907	...	...	...	...	...	...	...	...	1,750	900	6,000	1
Hercules	Pinole, Cal.	Prior to Jan., 1903	...	22,798	22,770	20,498	22,770	24,606	31,000	32,266	35,700	32,438	36,000	31,394
Joplin	Joplin, Mo.	Prior to Jan., 1903	...	108	1,485	1,285	2,228	1,855	2,250	2,317	3,375	2,594	4,500	281
Kenvil	Kenvil, N. J.	Prior to Jan., 1903	...	13,019	14,850	10,834	14,850	11,150	15,000	14,313	15,000	12,395	15,000	693
Louviers	Louviers, Colo.	May, 1908	...	...	...	...	...	...	...	...	...	...	6,050	4,676
Marquette	Marquette, Mich.	Prior to Jan., 1903	...	5,901	6,930	4,749	6,930	6,592	7,800	6,943	8,100	8,398	8,100	6,949
Mauch Chunk	Mauch Chunk, Pa.	Prior to Jan., 1903	...	1,221	1,782	1,190	1,782	1,115	1,500	1,499	2,700	1,856	3,000	9
Nobel	Nobel, Cal.	Prior to Jan., 1903	...	7,124	5,280	6,972	7,920	4,091	...	...	...	...	...	...
Oliver	Oliver Mills, Pa.	Prior to Jan., 1903	...	880	1,500	593	...	...	...	...	...	...	...	...
Repauno	Gibbstown, N. J.	Prior to Jan., 1903	...	24,542	29,700	25,841	35,640	31,012	35,100	37,040	40,000	36,493	40,000	31,802
Sterling	Lewisburg, Ala.	Prior to Jan., 1903	...	781	4,950	1,233	4,950	2,415	3,000	2,738	4,500	2,523	6,000	207
Vigorit	Pt. Isabel, Cal.	Prior to Jan., 1903	...	2,313	3,960	2,542	3,960	3,921	8,500	10,170	12,000	11,431	7,000	4,092
Weldy	Tamaqua, Pa.	Prior to Jan., 1903	...	406	644	635	644	868	765	101	...	...	...	...
TOTAL			...	109,493	126,026	103,187	142,512	119,614	157,715	153,259	181,625	161,839	188,350	131,804

NOTE:—Over 500 considered 1000. Less than 500 not considered.

Plaintiff's Exhibit 1125-A.

DYNAMITE.

Thousands Only.
Hundreds Omitted.

CAPACITIES OF AND NUMBER OF LBS OUTPUT OF ALL COMPETITIVE DYNAMITE COMPANIES FOR THE YEARS 1903 TO 1908 INCLUSIVE.

COMPANY	LOCATION	STARTED TO MFGR.	1903 CAPACITY	1903 OUTPUT	1904 CAPACITY	1904 OUTPUT	1905 CAPACITY	1905 OUTPUT	1906 CAPACITY	1906 OUTPUT	1907 CAPACITY	1907 OUTPUT	1908 CAPACITY	1908 OUTPUT
Aetna Powder Co.	Aetna, Ind.	Prior to Jan., 1903	9,600	6,467	9,600	6,429	9,600	9,039	15,000	12,839	20,000	12,009	22,800	10,300
Aetna Powder Co.	Thebes, Ill.	Aug. 1, 1907	...	...	...	...	...	...	...	...				
Ajax Dyn. Works	Kawkawlin, Mich.	Prior to Jan. 1, 1903	600	400	600	500	600	360	600	410	1,200	425	1,200	600
B. Alford Dyn. Wks.	Eldred, Pa.	Prior to Jan. 1, 1903	300	160	300	170	Shut down		...	...	...	...	...	...
Allentown N. F. Pdr. Co.	Guths Sta., Pa.	Oct. 1, 1905	...	...	...	...	450	56	1,800	670	1,800	570	1,800	366
American Dynalite Co.	Amherst, Ohio	Jan. 1, 1907	...	...	...	...	...	...	...	...	1,200	110	1,200	340
Anthony Powder Co.	Ishpeming, Mich.	Prior to Jan. 1, 1903	1,800	750	1,800	900	1,170	820	Plant completely destroyed 8-25-'05. Never rebuilt.					
Burton Powder Co. (Amer. H. E. Co.)	Coverts Sta., Pa.	July 1, 1907	...	...	...	...	...	...	...	...	3,000	1,247	6,000	2,616
Cerberite P. M. Co.	Lambert, Mo.	Aug., 1903	1,500	1,200	3,600	450	3,600	473	3,600	326	Out of business 1907.			
Crescent P. Co.	Franklin Forge, Pa.	1899	500	120	Plant blew up 4-30-03. Never Rebuilt				...	...	...	...	...	...
Elddred P. Co.	Eldred, Pa.	1901	900	80	900	85	900	113	900	81	900	66	900	60
Emporium P. M. Co.	Emporium, Pa.	Prior to Oct. 10, 1904	...	...	2,000	80	9,000	4,796	9,000	5,412	9,000	6,417	9,000	4,672
Eureka P. Co.	Greenup, Ill.	Sept., 1902	6,000	540	1,000	119	Shut down Mar., 1904		...	...	...	...	...	...
Explosives Mfg. Co.	Elmira, N. Y.	1902	900	400	900	240	338	80	Plant removed to Bonhampton, N. J., May 15, 1905					
Explosives Company	Bonhampton, N. J.	May 15, 1905	...	...	...	...	1,500	150	1,800	60	Out of business Mar. 1906. Plant Dism			

Plaintiff's Exhibit 1125-A (cont'd)

General Exp. Co.	Wharton, N. J.	Sept. 1,	1905	...	...	...	...	1,200	75	3,600	1,205	3,600	1,000	450	15
Giant P. Co., Cons.	Giant, Cal.	Prior to Jan.,	1902	12,000	8,796	12,000	9,376	12,000	10,489	12,000	14,079	16,200	13,103	16,200	11,166
Great Western P. Co.	Toledo, Ohio		1886	1,200	120	1,200	380	1,200	50	1,000	30	Out of business since Oct., 1906			
Hancock Chem. Co.	Dollar Bay, Mich.		1886	2,400	1,560	2,400	1,800	2,400	1,961	2,400	1,803	2,400	1,838	2,400	2,095
Illinois P. M. Co.	Grafton, Ill.	Dec. 15,	1907	...	...	...	...	...	...	...	...	375	32	9,000	2,250
Independent P. Co.	Carthage, Mo.	Sept.	1902	4,500	1,000	4,500	1,500	6,000	3,121	6,000	3,971	9,000	6,130	9,000	6,363
Jefferson P. Co.	Sayreton, Ala.	Mar. 1,	1906	...	...	...	...	...	...	2,500	533	3,000	975	3,000	1,324
Keystone P. M. Co.	Emporium, Pa.	Sept.	1900	6,000	2,881	9,000	5,270	9,000	6,632	9,000	6,977	9,000	8,255	9,000	5,432
G. R. McAbee P. & O. Co. (See West Penn. Powder Co.)	Shenks Ferry, Pa.	Apr.	1905	...	...	...	...	3,375	3,091	1,875	1,196	Plant destroyed June 9, 1906			
Masurite Exp. Co.	Masury, Ohio	Apr. 1,	1903	450	200	600	450	600	581	2,400	651	2,400	835	2,400	1,200
Maury P. Works	Seattle, Wash.	Oct.,	1905	...	...	...	...	300	2	1,200	61	300	3	Out of business Apr.	
J. S. Miller P. Co.	White Haven, Pa.	Oct.,	1900	300	28	300	40	300	19	300	27	300	16	300	40
Monguagon P. Co.	Grosse Ile, Mich.	July	1908	...	...	...	...	...	...	...	...	...	...	750	342
Nitro Pdr. Co.	Kingston, N. Y.		1896	3,000	864	3,000	963	4,500	1,127	4,500	436	4,500	624	4,500	750
Pacific H. Exp. Co.	Roberts Sta., Cal.		1907	...	...	...	...	...	...	...	...	400	35	1,200	550
Potts Pdr. Co.	Reynolds Sta., Pa.	June 1,	1907	...	...	...	...	...	...	...	...	2,800	935	4,600	3,116
Puget Sound & A.P.Co.	Mukilteo, Wash.	Jan.,	1908	...	...	...	...	...	...	...	...	...	...	1,800	291
Rockdale P. Co.	Hoffmanville, Md.	Feb.,	1902	3,750	500	3,750	600	3,750	999	3,750	828	3,750	632	3,750	400
Sinnamahoning P.M. Co.	Sinamahoning, Pa.	Aug. 1,	1906	...	...	...	...	...	...	3,125	1,255	7,500	3,288	7,500	2,809
Texas Dyn. Co.	Beaumont, Tex.	Oct. 1,	1906	...	...	...	...	...	...	750	30	3,000	205	3,000	115
Trojan Pdr. Co.	Overton, Colo.	Mar.,	1907	...	...	...	...	...	...	...	...	1,000	38	1,200	260
West Penn. Pdr. Co.	Tunnelton, Pa.	Mar., 1,	1907	...	...	...	...	...	...	...	...	7,500	1,706	9,000	625
TOTAL				55,700	26,066	57,450	29,353	71,783	44,034	87,100	52,880	114,128	60,494	121,950	58,097

Note:—Over 500 considered 1,000. Less than 500 not considered.

Plaintiff's Exhibit 1126.

BLACK POWDER.

Thousands Only.

Hundreds Omitted

CAPACITIES OF AND NUMBER OF KEGS OUTPUT

OF ALL DU PONT BLASTING MILLS DURING THE YEARS 1903 TO 1908 INCLUSIVE.

NAME	LOCATION	STARTED TO MFGR.	1903		1904		1905		1906		1907		1908	
			CAPACITY	OUTPUT	CAPACITY	OUTPUT	CAPACITY	OUTPUT	CAPACITY	OUTPUT	CAPACITY	OUTPUT	CAPACITY	OUTPUT
Belleville	Belleville, Ill.	Prior to Jan. 1, 1903	180	181	240	192	240	208	300	262	353	317	360	9
Birmingham	Birmingham, Ala.	Jan. 1, 1903	75	44	74	16	Discontinued		...	...	...	...	...	...
Brandywine	Montchanin, Del.	Jan. 1, 1903	585	396	435	178	249	156	390	172	356	318	390	88
Chattanooga	Coltewah, Tenn.	Jan. 1, 1903	330	320	330	287	330	310	330	319	353	298	330	171
Columbus	Turck, Kans.	Jan. 1, 1903	360	338	345	342	345	337	390	341	540	445	480	382
Conemaugh	Seward, Pa.	Jan. 1, 1903	120	84	Discontinued		...	...	...	...	...	...	...	...
Conneable	Conneable, Ala.	Apr. 1, 1904	...	...	180	129	240	240	330	302	353	213	390	163
Consumers	Storrs Jct., Pa.	Prior to Jan. 1, 1903	180	171	210	188	225	224	240	179	218	220	210	235
Dorner	Newburg, Ind.	Jan. 1, 1903	195	186	180	44	Discontinued		...	...	...	...	...	...
Enterprise	Gracedale, Pa.	Jan. 1, 1903	144	98	150	118	150	139	150	123	165	161	158	173
Fairchance	Fairchance, Pa.	Jan. 1, 1903	240	218	240	236	240	238	240	243	390	384	480	244
Farmingdale	Farmingdale, N. J.	Jan. 1, 1903	180	67	180	52	Discontinued		...	...	...	...	...	...
Ferndale	Ferndale, Pa.	Jan. 1, 1903	300	250	150	154	150	152	225	152	240	238	300	162
Fontanet	Fontanet, Ind.	Jan. 1, 1903	420	380	480	381	480	372	540	371	450	252	Discontinued	
Hazardville	Hazardville, Conn.	Jan. 1, 1903	263	201	...	1	Discontinued		..	...	...	...	...	...

Plaintiff's Exhibit 1126 (cont'd).

Kellogg	Kellogg, W. Va.	Jan. 1, 1903	195	84	150	162	150	66	195	164	225	208	225	124
Lake Superior	Marquette, Mich.	Jan. 1, 1903	83	45	120	11	Discontinued		...	...	...	...	...	...
Meadowbrook	Meadowbrook, West Virginia	May, 1903	87	43	132	23	Discontinued		...	...	...	...	...	...
Mooar	Mooar, Ia.	Prior to Jan. 1, 1903	900	843	930	874	930	866	1,170	1,140	1,185	1,172	1,260	1,090
Moosic	Moosic, Pa.	Jan. 1, 1903	270	234	270	271	278	274	270	243	270	265	270	269
Nemours	Powder, W. Va.	Aug. 29, 1904	...	...	210	70	240	242	315	258	360	278	360	158
Newhall	Newhall, Me.	Prior to Jan. 1, 1903	221	96	90	59	Discontinued		...	...	...	...	...	...
Oliver	Laurel Run, Pa.	Jan. 1, 1903	300	229	240	221	240	225	250	219	270	243	270	255
Patterson	Patterson, Okla.	Sept. 17, 1907	...	...	...	...	...	...	...	...	50	35	300	134
P. & K.	Pittsburg, Kans.	Feb. 1903	98	76	120	109	180	131	263	267	278	272	285	225
Pleasant Prarie	Pl. Prairie, Wis.	Prior to Jan. 1, 1903	450	370	420	332	420	393	420	361	525	494	600	575
Riker	Punxsutawney, Pa.	Jan. 1, 1903	180	157	180	153	180	147	180	143	Discontinued		...	...
Rosendale	Rosendale, N. Y.	Jan. 1, 1903	240	235	240	57	240	4	240	179	240	192	240	25
Rushdale	Jermyn, Pa.	Jan. 1, 1903	150	135	180	157	180	194	210	187	225	221	210	230
Shenandoah	Krebs Sta., Pa.	Jan. 1, 1903	90	70	90	82	105	109	113	75	113	99	120	103
Santa Cruz	Santa Cruz, Cal.	Jan. 1, 1903	270	223	270	224	270	272	390	401	405	395	450	256
Sycamore	Sycamore, Tenn.	Jan. 1, 1903	165	141	165	88	Discontinued		...	...	...	...	...	...
Tamaqua	Tamaqua, Pa.	Jan. 1, 1903	105	102	150	127	150	139	113	89	53	21	Discontinued	
Wapwallopen	Wapwallopen, Pa.	Jan. 1, 1903	255	296	300	289	315	314	330	299	330	331	315	324
Wayne	Wayne, N. J.	Jan. 1. 1903	140	111	7	7	28	28	40	40	63	63	51	51
Youngstown	Youngstown, O.	Jan. 1, 1903	210	219	210	208	210	152	225	215	240	228	240	189
TOTAL			7,981	6,643	7,668	5,842	6,765	5,932	7,859	6,744	8,250	7,363	8,294	5,635

Plaintiff's Exhibit 1127.

BLACK POWDER.

Thousands Only.
Hundreds Omitted

CAPACITIES OF AND NUMBER OF KEGS OUTPUT OF ALL COMPETITIVE BLASTING POWDER COMPANIES FOR THE YEARS 1903 TO 1908 INCLUSIVE.

COMPANY	LOCATION	STARTED TO MFGR.	1903		1904		1905		1906		1907		1908	
			CAPACITY	OUTPUT	CAPACITY	OUTPUT	CAPACITY	OUTPUT	CAPACITY	OUTPUT	CAPACITY	OUTPUT	CAPACITY	OUTPUT
American Powder Mills	Maynard, Mass.	Prior to Jan. 1903	90	25	90	25	90	20	90	31	90	17	90	30
Austin Powder Co.	Falls Jct., Ohio	Jan., 1903	480	434	480	429	480	420	480	403	480	502	480	414
Black Diamond Powder Co.	Houcks St., Pa.	Dec. 1905	...	...	...	...	5	1	60	18	60	32	60	46
Buckeye Pdr. Co.	Edwards Sta., Ill.	Nov. 1, 1903	60	15	300	120	300	154	300	73	300	85	300	50
Burton Powder Co.	Quaker Falls, Pa.	Aug. 1, 1904	...	...	100	18	180	172	300	209	300	170	300	205
Connell Powder Co.	Treverton, Pa.	Prior to '03	144	100	144	125	144	33	144	24	144	59	144	43
Cressona Powder Co.	Cressona, Pa.	Prior to Jan., 1903	90	75	90	75	90	64	90	53	90	60	90	53
Egyptian Powder Co.	Marion, Ill.	Feb. 4, 1904	...	...	247	100	270	144	360	138	360	257	360	165
Equitable P. M. Co.	E. Alton, Ill.	Jan., 1893	300	289	300	288	363	304	600	536	600	643	600	415
Equitable P. M. Co.	Ft. Smith, Ark.	Oct. 15, 1905	...	...	...	...	200	44	300	121	300	194	300	134
Excelsior P. M. Co.	Holmes Park, Mo.	May 1, 1905	...	...	...	...					38	23	90	44
Giant P. Co., Cons.	Clipper Gap, Cal.	Sept. 1, 1906							40	5	120	40	120	54
Jefferson Pdr. Co.	Sayerton, Ala.	Sept., 1906												
King Powder Co.	Kings Mills, Pa.	Prior to Jan., 1903	420	250	420	225	420	260	420	285	420	224	420	210
Lakeside Powder Co.	Mahanoy Jct., Pa.	Nov., 1900	105	25	105	50	105	60	105	48	105	24	Plant dismantled	

Plaintiff's Exhibit 1127 (cont'd)

Locust Mnt. P. & D. Co.	Krebs Sta., Pa.	Mar. 16, 1904	Suc O' Hare Pdr. Co. March 16, 1904		47	35	60	24	60	21	60	19	45	27
Lofty Pdr. Co.	Lofty, Pa.	1900	45	30	45	30	45	22	45	23	45	18	45	15
Miami Pdr. Co.	Goes, Ohio	Prior to Jan., 1903	480	272	480	225	480	433	730	581	780	585	780	438
Miami Pdr. Co.	Thebes, Ill.	Mar. 1, 1906	...	...	...	...	...	...						
J. S. Miller Pdr. Co.	White Haven, Pa.	1900	60	40	60	30	60	19	60	7	60	17	90	45
Nuremburg P. Co.	Tomhicken, Pa.	1904	Suc. Tomhicken Pdr. Co. ...	...	68	25	68	29	68	23	68	22	68	31
O'Hare Pdr. Co.	Krebs Sta., Pa.	1887	60	30	13	15	Suc. By Locust Mnt. P. & D. Co., March 16, 1904		...	...	...	...	...	...
Penna. P. D. & F. Co.	Brandonville, Pa.	Dec., 1903	6	3	75	36	75	55	75	41	44	57	Plant destroyed Aug. 8, 1907	
D. C. Rand P. Co.	Pittsford, N. Y.	Prior to Jan., 1903	45	35	45	30	45	23	45	10	45	11	45	20
Rand P. Co. of Penna.	Fairchance, Pa.	July, 1900	180	150	180	200	120	120	Plant totally destroyed by explosion Sept. 2, 1905					
Rand P. Co. of Tenn.	Marlow, Tenn.	Aug. 23, 1905	...	...	...	...	65	34	180	136	270	149	270	154
Roberts Pdr. Co.	Krebs Sta., Pa.	Prior to Jan., 1903	75	40	75	50	75	50	75	45	75	67	75	60
Rockdale P. Co.	Hoffmanville, Md.	July 1, 1901	150	75	150	100	150	39	150	10	150	5	150	Idle
Senior P. Co.	Morrow, Ohio	Oct. 14, 1904	...	...	62	40	189	150	240	193	300	209	300	155
Shamokin P. Co.	Shamokin, Pa.	Prior to Jan., 1903	173	75	173	100	173	87	173	69	173	76	173	67
Standard P. Co.	Horrell, Pa.	Feb. 1, 1904	...	...	248	100	270	136	Plant destroyed Jan. 10, 1907. Resumed oper. Nov. 15, 1907					
Tennessee P. Co.	Jellico, Yehn.	Aug. 1, 1907	...	...	...	...	...	...	270	119	9	2	22	7
Tomhicken P. Co.	Tomhicken, Pa.	Prior to Jan., 1903	68	10	Suc. by Nuremburg Pdr. Co., 1904.				...	...	75	43	180	58
United States P. Co.	Coalmont, Ind.	Nov. 1, 1904	...	...	8	4	180	161	240	196	300	265	300	236
Western Pds. Mfg. Co.	Edwards Sta., Ill.	Nov. 1, 1908	...	...	...	...	...	...	...	...	...	...	60	30
TOTAL			3,031	1,973	4,005	2,475	4,702	3,058	5,700	3,418	3,418	3,875	5,957	3,206

NOTE:—Over 500 considered 1,000, less than 500 not considered.

8122 **Plaintiff's Exhibit 1143.**

Applegate and Lewis Coal Company, Cuba, Illinois; date of contract, August first, 1903, three years, rebate fifteen cents per keg. Applegate and Lewis Coal Company was supplied du Pont powder through Dooley Brothers at Peoria, Illinois.

Athens Mining Company, Athens, Illinois; date of contract, May first, 1903, three years, net one dollar and twenty cents.

Auburn and Alton Coal Company, Auburn, Illinois; date of contract, May first, 1903, three years, one dollar and twenty cents net.

8123 Barkley Coal and Mining Company, Barkley, Illinois. That contract was afterwards covered by one with the West End Coal Company, which succeeded the Barkley Coal Company.

Barrett Hardware Company, Joliet, Illinois; had a special price of one dollar and twenty-five cents per keg. No contract; simply a special price under instructions from the home office.

Big Creek Coal Company, Kewannee, Illinois; date of contract, July fifteenth, 1904, for three years, net one dollar and seventeen and one-half cents.

Blue Mound Coal Company, Blue Mound, Illi-
8124 nois; date of contract, May first, 1904, for three years, one dollar and twenty-five cents per keg.

C. C. and Edward Brown, Springfield, Illinois. I think that covered the three companies, referred to later on—date of contract May first, 1904, for three years, one dollar and fifteen cents net.

Bruce and Burdick, Joliet, Illinois; had a special price of one dollar and ten cents per keg.

Canton Union Coal Company, Canton, Illinois; date of contract, August first, 1903; for three years, one dollar and twenty-five cents per keg.

Cantrall Co-operative Coal Company, Cantrall, Illinois; date of contract, May first, 1903, for three

years; price one dollar and twenty cents, rebate increased two and a half cents; making the net one dollar and seventeen and a half cents. The increase occurred Aufust second, 1904.

Capital Coal Company, Springfield, Illinois; date of contract, May first, 1904; written for three years; net price one dollar and seventeen and a half cents; changed by increase of rebate to one dollar and fifteen cents.

Chicago Springfield Coal Company, Springfield, Illinois; date of contract, September first, 1904, for three years; one dollar and twenty-five cents 8126
per keg.

Chicago Virden Coal Company, Virden, Illinois; date of contract, March first, 1904, for one year; one dollar and twelve and one-half cents.

Citizens Coal Mining Company, Lincoln, Illinois; date of contract, May first, 1903, for three years; one dollar and twenty cents.

Citizens Coal Mining Company, Lincoln, Illinois; date of contract, May first, 1903, for three years; one dollar and twenty cents; and the Citizens Coal Mining Company, Springfield, Ill., date of contract May first, 1903; for three years at one dollar and seventeen and one-half cents. 8127

Clark Coal and Coke Company, Peoria, Illinois; du Pont powder supplied through Dooley Brothers; contract dated August first, 1903, for three years; one dollar and twenty cents.

Colfax Co-operative Company, Colfax, Illinois; date of contract, May first, 1904, for three years; one dollar and twenty-five cents.

Coal Valley Mining Company, Coal Valley, Illinois; date of contract, November first, 1904; written for one year, at one dollar per keg. This was free on board company's mills, the coal mining company being owned by the Rock Island road who

owned several other mines; and covered the requirements of different mines in one contract.

Collier Co-operative Coal Company, Peoria, Illinois; date of contract, May first, 1903, for three years; one dollar and twenty cents per keg; du Pont powder supplied through C. J. Off and Company.

Colorado Fuel and Iron Company, Denver, Colorado; contract dated June first, 1902, for three years, at one dollar net, f. o. b. company's mills, Keokuk, Iowa.

8129 Co-operative Coal Company, Fairbury, Illinois; one dollar and twenty-five cents price pending further instructions.

Crescent Coal Company, Oskaloosa, Iowa; contract dated February first, 1904, for three years; rebate was fifteen cents. Net price one dollar and thirty cents.

Henry Darts' Sons, Rock Island, Illinois; until further advice, one dollar and twenty-five cents.

Decatur Coal Company, Decatur, Illinois; contract dated September first, 1903, for three years; one dollar and twenty-five cents.

C. T. Deffenbaugh, Peoria, Illinois; contract
8130 dated August first, 1903, for three years; one dollar and twenty-five cents; Hazard powder supplied through Oakford & Fahnestoch.

Des Moines Coal and Mining Company, Des Moines, Iowa; contract dated May first, 1903, for three years; one dollar and twenty-five cents.

Drake Hardware Company, Burlington, Iowa; an open, or special price, of one dollar and thirty-five cents.

Stephen Drake, Canton, Illinois; date of contract, November first, 1904, for three years; one dollar and twenty-five cents.

East Peoria Coal Company, East Peoria, Illinois;

date of contract, September first, 1904, for three years; one dollar and twenty-five cents.

Economy Coal Company, Des Moines, Iowa; date of contract May first, 1904, for three years; one dollar and thirty-five cents.

Essex and Fritz Coal Mining Company, Galesburg, Illinois; date of contract September first, 1904, for three years; one dollar and twenty-five cents: du Pont powder supplied through Dooley Brothers, Peoria.

Farmington Coal Company, Farmington, Illinois; date of contract May first, 1903, for three 8132
years; one dollar and twenty-five cents; du Pont powder supplied through Charles J. Off and Company, Peoria, Illinois.

Flint Brick and Coal Company, Des Moines, Iowa; date of contract January first, 1904, for three years; one dollar and thirty-five cents.

W. E. Foley, Mapleton, Illinois; contract dated August first, 1903, for three years; one dollar and twenty cents; Hazard powder supplied through Oakford and Fahnestoch, Peoria.

J. B. Gardner, Canton, Illinois; date of contract April twenty-eighth, 1904; special price of one dollar and twenty-five cents. 8133

Garfield Coal Company, Beacon, Iowa; date of contract May first, 1903, three years; one dollar twenty-seven and one-half cents.

The Green View Coal and Mining Company, Green View, Illinois; date of contract May first, 1903, for three years; one dollar seventeen and one-half cents.

Peter Grant, Junior, Peoria, Illinois; date of contract August first, 1903, for three years; one dollar and twenty-five cents; du Pont powder supplied through Dooley Brothers, Peoria.

Haw and Semmons Company, Ottumwa, Iowa;

date of contract July first, 1904, for one year; one dollar and twenty-five cents.

D. Heenan Mercantile Company, Streator, Illinois; special price of one dollar twenty cents.

Hollingsworth Coal Company, Des Moines, Iowa; date of contract June first, 1904, for three years; one dollar and twenty-seven and a half cents.

Illinois and Iowa Fuel Company, Ottumwa, Iowa; date of contract May first, 1903, for three years; one dollar and thirty cents per keg.

Jefferson Coal Mining Company, Springfield, Illi-
8135 nois; date of contract September first, 1903, for three years; rebate increased from ten cents to seventeen and a half cents, making a net price, during a portion of the contract period, of one dollar and seventeen and one-half cents.

The Jones and Adams Company, Chicago, Illinois; date of contract May first, 1903, for three years; one dollar and fifteen cents. Deliveries on this contract were made at Springfield, Illinois.

C. B. Kramm and Brothers, Edwards Station, Illinois; date of contract August first, 1903, for three years; one dollar and twenty-five cents; Hazard powder supplied through Oakford and Fahnestoch,
8136 Peoria.

Krapp and Lees, Coal Valley, Illinois; date of contract May first, 1903, for three years; original rebate ten cents, increased to fifteen cents; net one dollar and twenty cents, under instructions of October twenty-second, 1904.

Lake Erie Coal and Mining Company, East Peoria, Illinois; date of contract September first, 1904, for three years; one dollar and twenty-five cents; du Pont powder supplied through Dooley Brothers.

Lincoln Park Coal Mining Company, Springfield, Illinois; date of contract September first, 1903, for

three years, rebate ten cents. Net one dollar and twenty-five cents. I beg your pardon.

Lynchfield Mining and Powder Company, Lynchfield, Illinois, J. D. Krabb, Receiver; date of contract May first, 1903, for three years; one dollar and twenty cents.

Edward Little, Peoria, Illinois; date of contract May first, 1903, for three years; one dollar and twenty-five cents.

Monmouth Vein Coal Company, Hamilton, Iowa; date of contract May first, 1903, for three years; one dollar and twenty-five cents. 8138

Manufacturers Coal and Coke Company, Chicago; date of contract May first, 1903, for three years, original rebate seventeen and one-half cents, increased to twenty-two and one-half cents, making one dollar and twelve cents net.

Maplewood Coal Company, Farmington, Illinois; date of contract May first, 1903, for three years; rebate increased from seventeen and one-half cents to twenty cents; net one dollar and fifteen cents.

P. W. Meehan, Cuba, Illinois; date of contract August first, 1903, for three years; rebate ten cents, increased to fifteen cents; net, one dollar and twenty cents. C. J. Off and Company supplying du Pont 8139 powder, and Oakford and Fahnestoch supplying Hazard.

The Middleton Coal Company, Middleton, Illinois; date of contract September first, 1904, for three years; one dollar and seventeen and one-half cents.

Monarch Coal and Mining Company, Farmington, Illinois; date of contract May first, 1903, for three years; one dollar and twenty-five cents; du Pont powder supplied through C. J. Off and Company, Peoria.

Monmouth Coal Company, Brereton, Illinois:

8140 *Plaintiff's Exhibit 1143*

date of contract May first, 1903, for three years; rebate originally seventeen and one-half cents, increased to twenty cents; net one dollar and fifteen cents.

Newcomb Brothers, Peoria, Illinois; date of contract May first, 1903, for three years; one dollar and fifteen cents; du Pont powder supplied through C. J. Off and Company, Peoria.

Norris Supply Company, Norris, Illinois, date of contract May first, 1903, for three years; rebate ten cents, increased to fifteen cents; net one dollar
8141 and twenty cents; du Pont powder supplied through C. J. Off and Company, Peoria.

Oskaloosa Coal and Mining Company, Oskaloosa, Iowa; date of contract May first, 1903, for three years; one dollar and thirty-cents.

Petersburg Coal Mining Company, Petersburg, Illinois; date of contract October twenty-second, 1903, for three years; one dollar and twenty-five cents.

Rainbow Coal and Mining Company, Sullivan, Indiana; date of contract May first, 1903, for three years; one dollar and twenty cents.

A. Rentz and Brother, Kramm Station, Illinois;
8142 date of contract August first, 1904, for three years; one dollar and twenty-five cents; du Pont powder supplied through Dooley Brothers, Peoria.

Republic Iron and Steel Company, Springfield, Illinois; date of contract May first, 1903, for three years; one dollar and twenty cents per keg.

Rock Island Coal Company, Chicago, Illinois; contract dated November first, 1904, for one year; net price company's Iowa mills, one dollar per keg.

Roanoke Coal and Mining Company, Roanoke, Illinois; date of contract August first, 1904, for three years; one dollar and twenty cents.

Sangamond Coal Company, Springfield, Illinois;

date of contract May first, 1902, for three years; one dollar and seventeen and one-half cents.

Sholl Brothers, Peoria, Illinois; date of contract August first, 1903, for three years; one dollar and seventeen and one-half cents; du Pont powder supplied through Dooley Brothers, Peoria.

Smoky Hollow Coal Company, Avery, Iowa; date of contract October seventeenth, 1903, for three years; one dollar and twenty-five cents.

South Mountain Coal Company, Petersburg, Illinois; date of contract September first, 1903, for 8144
three years; one dollar and twenty-five cents.

Spalding Coal Company, Spalding, Illinois; date of contract May first, 1903, for three years; one dollar and fifteen cents.

Spoon River Coal Company, Galesburg, Illinois; date of contract October first, 1904, for three years; one dollar and twenty-five cents; du Pont powder supplied through Dooley Brothers, Peoria.

Springfield Coal Mining Company, New York; date of contract, March twelfth, 1903, for three years; rebate twenty-two and one-half cents increased to twenty-five cents, September twentieth, 8145
1904. Deliveries on this contract were made to mines at Springfield, or in the immediate vicinity of Sagamond County, Ohio, at one dollar and ten cents.

Springfield Co-operative Coal Company, Springfield, Illinois; date of contract, May first, 1903, for three years; one dollar and seventeen and one-half cents.

Star Coal Company, Streator, Illinois; date of contract May first, 1903, for three years; one dollar and seventeen and one-half cents.

Tallulla Coal Company, Tallulla, Illinois; date of contract, September first, 1903, for three years; one dollar and twenty cents per keg.

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Tazwell Coal Company, Pekin, Illinois; date of contract August first, 1903, for three years; one dollar and twenty-five cents; Hazard powder supplied through Oakford and Fahnestoch, Peoria.

Tuxhorn Coal Company, date of contract, January first, 1904, for three years; one dollar and twenty-five cents.

Treasurer Coal Company, Bartonville, Illinois; date of contract September first, 1903, for three years; one dollar and twenty-five cents; du Pont
8147 powder supplied through Dooley Brothers, Peoria.

Trutter Coal Company, Pleasant Plains, Illinois; date of contract September first, 1903, for three years; one dollar and twenty-five cents.

United States Gypsum Company, Chicago; contract dated July first, 1904, for one year; one dollar and seventeen and one-half cents; used du Pont, Austin and Hazard powder.

Vicary Brothers, Peoria, Illinois; date of contract August first, 1903, for three years; one dollar and twenty cents; du Pont powder supplied through Dooley Brothers, Peoria.

8148 Victor Fuel Company, Denver, Colorado; date of contract July first, 1903, for three years; sold at net price f. o. b. Iowa mills, one dollar per keg.

H. S. Vincent, Fort Dodge, Iowa; special price, pending further instructions, one dollar and thirty-five cents.

Wabash Coal Company, Springfield, Illinois; date of contract May first, 1903, for three years; one dollar and fifteen cents.

Mr. James Walker, Mapleton, Illinois; date of contract August first, 1903, for three years; one dollar and twenty-five cents; du Pont powder supplied through C. J. Off and Company, Peoria.

Walton Brothers, Fairbury, Illinois; date of contract May first, 1903, for three years; one dollar and twenty-five cents.

Plaintiff's Exhibit 1143

I. Wantling and Sons, Peoria, Illinois; date of contract October first, 1904, for three years; one dollar and twenty cents per keg.

Wapello Coal Company, Hiteman, Iowa; date of contract May first, 1903, for three years; one dollar and twenty-five cents.

West End Coal Company, Springfield, Illinois; date of contract October first, 1903, for three years; one dollar and fifteen cents.

What Cheer Fuel Company, What Cheer, Iowa; date of contract August thirteenth, 1904; one dollar and thirty cents; special price.

White Breast Fuel Company, Chicago, Illinois; date of contract June first, 1902, for three years; one dollar and ten cents.

Williamsville Coal Company, Williamsville, Illinois, date of contract May first, 1903, for three years; one dollar and twenty cents.

R. L. Wilson, Coal Valley, Illinois; special price, pending further instructions, one dollar and twenty-five cents.

Winters Coal Company, Bartonville, Illinois; date of contract August first, 1903, for three years; one dollar and twenty-five cents; Hazard powder supplied through Oakford and Fahnestoch, Peoria.

S. Wolschlag Brothers, Peoria, Illinois; date of contract August first, 1903, for three years; one dollar and seventeen and one-half cents; supplied du Pont powder through Dooley Brothers, Peoria.

Wyoming Coal Company, Wyoming, Illinois; date of contract January first, 1904, for three years; one dollar and twenty-five cents; Hazard powder supplied through Oakford and Fahnestoch, Peoria.

Yates City Coal Company, Yates City, Illinois; date of contract February first, 1904, for three years; one dollar and twenty-five cents; Hazard powder supplied through Oakford and Fahnestoch, Peoria.

8152 **Plaintiff's Exhibit 1144.**

No. 238, Applegate and Lewis Coal Company;
Athens Mining Company, No. 199;
Auburn and Altan Coal Company, No. 119;
Barrett Hardware ompany, No. 342;
Big Creek Coal Company, No. 131;
Blue Mound Coal Company, No. 506;
C. C. & Edward Brown, No. 118;
Bruce and Burdick, No. 266;
Canton Union Coal Company, No. 132;
Cantrall Co-operative Coal Company, No. 39;
8153 Capital Coal Company, No. 14;
Central Coal and Coke Company, No. 375;
Chicago Springfield Coal Company, No. 570;
Chicago Virden Coal Company, No. 12.
Citizens Coal Mining Company, No. 282;
Citizens Coal Mining Company, Springfield, No. 282;
Clarke Coal and Coke Company, No. 267;
Colfax Co-operative Company, No. 502;
Coal Valley Mining Company, No. 324;
Collier Co-operative Coal Company, No. 96;
8154 Colorado Fuel and Iron Company, No. 399;
Co-operative Coal Company, Fairbury, No. 553;
Crescent Coal Company, No. 368;
Henry Darts' Sons, No. 228;
Decatur Coal Company, No. 304;
C. T. Deffenbaugh, No. 272;
Des Moines Coal and Mining Company, No. 8;
Drake Hardware Company, No. 292;
Stephen Drake, No. 579;
East Peoria Coal Company, No. 560;
Economy Coal Company, No. 392;
Essex and Fritz Coal Mining Company, No. 386;
Farmington Coal Company, No. 213;
Flint Brick and Coal Company, No. 111;
W. E. Foley, No. 99;
J. B. Gardner, No. 186;

Plaintiff's Exhibit 1144 8155

Garfield Coal Company, No. 49;
The Green View Coal and Mining Company, No. 202;
Peter Grant, Jr., No. 303;
Haw and Semmons Company, No. 135;
D. Heeman, Mercantile Company, No. 55.
Hollingsworth Coal Company, No. 513;
Illinois and Iowa Fuel Company, No. 50;
Jefferson Coal Mining Company, No. 372;
The Jones and Adams Company, No. 151;
C. B. Kramm and Brothers, No. 279; 8156
Krapp and Lees, No. 17;
Lake Erie Coal and Mining Company, No. 538;
Latham Coal Company, No. 200;
Lincoln Park Coal Mining Company, No. 371;
Lynchfield Mining and Power Company, No. 177;
Edward Little, No. 41;
Monmouth Vein Coal Company, No. 77;
Manufacturers Coal and Coke Company, No. 122;
Maplewood Coal Company, No. 52;
P. W. Meehan, No. 203;
Middleton Coal Company, No. 542; 8157
Monarch Coal and Mining Company, No. 325;
Monmouth Coal Company, No. 10;
Newsomb Brothers, No. 128;
Morris Supply Company, No. 6;
Oskaloosa Coal and Mining Company, No. 34;
Petersburg Coal Mining Company, No. 340;
Rainbow Coal and Mining Company, No. 81;
A. Rentz and Brother, No. 337;
Republic Iron and Steel Company, No. 201;
Rock Island Coal Company, No. 434;
Roanoke Coal and Mining Company, No. 562;
Sangamond Coal Company, No. 294;
Shell Brothers, No. 285;
Smoky Hollow Coal Company, No. 33;
South Mountain Coal Company, No. 36;

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Spalding Coal Company, No. 38;
Spoon River Coal Company, No. 87;
Springfield Coal Mining Company, No. 226;
Springfield Co-operative Coal Company, No. 149;
Star Coal Company, No. 44;
Tallulla Coal Company, No. 126;
Tazwell Coal Company, No. 240;
Tuchorn Coal Company, No. 420;
Treasurer Coal Company, No. 290;
Trutter Coal Company, No. 310;
8159 United States Gypsum Company, No. 178;
Vickary Brothers, No. 265;
Victor Fuel Company, No. 63;
H. S. Vincent, No. 100;
Wabash Coal Company, No. 148;
James Walker, No. 245;
Walton Brothers, No. 121;
I. Wantling and Sons, No. 575;
Wapello Coal Company, No. 11;
West End Coal Company, No. 109;
What Cheer Fuel Company, No. 284;
White Breast Fuel Company, No. 4;
8160 Williamsville Coal Company, No. 108;
R. L. Wilson, No. 256;
Winters Coal Company, No. 336;
S. Wolschlog Brothers, No. 277;
Wyoming Coal Company, No. 262;
Yates City Coal Company, No. 348.

Plaintiff's Exhibit 1219.

STATEMENT SHOWING AVERAGE YEARLY GROSS PRICE OBTAINED FOR A. BLASTING AND B. BLASTING FOR YEARS SHOWN AT THE FOLLOWING OFFICES.

E. I. du PONT de NEMOURS POWDER CO.

	Marquette		Boston		New York		Philadelphia		Hazelton		Pittsburg		Huntington		San Francisco	
	A. Blast	B. Blast	A. Blast	B. Blast	A. Blast	B. Blast	A. Blast	B. Blast	A. Blast	B. Blast	A. Blast	B. Blast	A. Blast	B. Blast	A. Blast	B. Blast
1903.....	0	1.42	2.41	1.58	2.42	1.31					1.84	1.18				
1904.....	0	1.38	2.43	1.44	2.18	1.31	1.94	1.13	2.63	.95	1.87	1.10	0	1.14	*	*
1905.....	0	1.34	Consolidated with		2.12	1.38	1.87	1.08	2.59	.94	1.88	1.04	0	1.12	2.41	1.36
1906.....	0	1.26	New York		2.36	1.36	1.88	1.04	1.51	.95	1.84	.98	0	1.01	2.27	1.18
1907.....	0	1.37			2.24	1.50	1.85	1.04	1.52	.94	1.91	.97	0	1.01	2.53	1.16
1908.....	Office Discontinued				2.31	1.60	2.10	1.14	1.64	1.01	2.32	1.11	2.43	1.12	3.07	1.34

	Cincinnati		Nashville		Birmingham		St. Louis		Chicago		Denver		Duluth		Scranton	
	A. Blast	B. Blast	A. Blast	B. Blast	A. Blast	B. Blast	A. Blast	B. Blast	A. Blast	B. Blast	A. Blast	B. Blast	A. Blast	B. Blast	A. Blast	B. Blast
1903.....	2.95	1.22					2.31	1.25	2.31	1.22	0	1.69				
1904.....	2.89	1.19					2.33	1.24	2.35	1.15	0	1.56	0	1.41		
1905.....	2.27	1.10			2.07	1.15	2.31	1.12	2.30	1.04	0	1.47	0	1.29	0	1.17
1906.....	2.26	1.02			2.19	1.06	2.26	1.03	2.14	.98	0	1.11	0	1.25	0	1.17
1907.....	2.30	1.02	2.22	1.06	0	1.04	2.22	1.01	2.21	.98	0	1.05	0	1.22	0	1.13
1908.....	Office Discontinued		2.38	1.14	0	1.05	2.59	1.10	2.62	1.08	2.45	1.11	0	1.22	0	1.18

*Records not Obtainable.

Checked O. K.
Compiled from
Company record
A true copy
10/23/13
W. P. Zaran

E. I. du Pont de Nemours
Powder Company
10/23/13

2721

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8164 **Plaintiff's Exhibit 1247-B.**

THIS CONTRACT entered into this Ninth day of November, 1907, by and between the E. I. du Pont de Nemours Powder Company, a corporation of the State of New Jersey, party of the first part, and Dooley Brothers, of Peoria, Illinois, party of the second part.

(1) WITNESSETH: That the party of the part hereby purchases all of the black blasting powder required by the party of the second part, dur-
8165 ing the period of this contract, for use or sale in the Peoria Coal Mining District at the following prices:

CARLOAD LOTS—f. o. b. Peoria, Illinois, direct sale to party of the second part for local sale and distribution by party of second part: 800 kegs or more, one shipment, $1.05 net; 400 kegs or less than 800 kegs, one shipment, $1.07½ net.

Carload shipments made by party of the first part direct to customers of party of the second part
8166 in the Peoria coal mining district, f. o. b. nearest railway station: 800 kegs or more, one shipment, $1.05; less 5c per keg commission to party of the second part; 400 kegs or less than 800 kegs, one shipment, $1.07½; less 5c per keg commission to party of the second part.

The above prices are based on present freight rates, and present minimum carload quantity, but in case the present freight rates or present minimum carload quantity are increased or decreased during the existence of this contract, the amount of such increase or decrease shall be added to or deducted from the above prices.

The above prices are also based on present method of packing and transporting powder, but in case the present method of packing and transport-

ing powder is prevented by law, or railroad association regulations during the existence of this contract, then in that event this contract, may at the election of the party of the first part, be terminated.

The following conditions are mutually accepted:

(2) Party of the second part to make car load sales only to such customers as may be approved by party of the first part.

Sales of less than carload lots by party of the second part are to be confined to Peoria County, Illinois, and to the Pekin mining district in Tazewell County, Illinois, unless special permission be first secured from party of the first part. 8168

(3) (Crossed out).

(4) The party of the first part is not to be responsible for delays caused by strikes, accidents or causes beyond its control.

(5) This contract to go into effect on ninth day of November, 1907, and continue in force until ninth day of November, 1908, and thereafter from year to year unless written notice is mailed to the address of either party, by the other, sixty (60) days prior to ninth day of November of any year, in which event upon the arrival of such date the contract is to be terminated. 8169

(6) This contract does not become binding until accepted by the E. I. DU PONT DE NEMOURS POWDER COMPANY, at its main office at Wilmington, Delaware.

E. I. DU PONT DE NEMOURS POWDER COMPANY,
By P. H. Donnelly, Salesman, &c.

Dooley Bros.
By J. B. Dooley.

ACCEPTED at Wilmington, Del.,
Nov. 19, 1907.
E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Wm. Coyne.

8170 **Plaintiff's Exhibit 1247-AA.**

THIS CONTRACT entered into this 27th day of November, 1908, by and between the E. I. DU PONT DE NEMOURS POWDER COMPANY, a corporation of the State of New Jersey, party of the first part, and DOOLEY BROTHERS, Peoria, Illinois, party of the second part.

(1) WITNESSETH: That the party of the first part hereby sells and the party of the second part hereby purchases all of the explosives and blasting
8171 supply requirements, required by the party of the second part, during the period of this contract, for use of Sholl Brothers, Peoria, Illinois, mines at Peoria, Illinois, at the following prices.

BLASTING POWDER CARLOADSS 800 kegs or over, $1.10 per keg, delivered f. o. b. nearest railway station; less 5c per keg commission to Messrs. Dooley Brothers.

Any other explosives or blasting supplies not specified in this contract to be furnished at current prices which are charged by the du Pont Company
8172 in the district in which the explosives or blasting supplies are to be used.

The prices herein are based on present freight rates, and present minimum carload quantity, but in case the present freight rates or present minimum carload quantity are increased or decreased during the existence of this contract, the amount of such increase or decrease shall be added to or deducted from the above prices.

The prices herein are also based on present method of packing and transporting powder, but in case the present method of packing and transporting powder is prevented by law or railway associations during the existence of this contract, then in that event this contract may, at the election of the party of the first part, be terminated.

Plaintiff's Exhibit 1247-AA 8173

The following conditions are mutually accepted:

(2) TERMS ARE 30 days or 2% for cash if paid within 10 days of date of invoice.

(3) It is agreed that explosives furnished under this contract are for consumption of the party of the second part only and not for sale except to its own sub-contractors or employes and that a violation of this clause gives the party of the first part the option of cancellation of this contract.

8174

(4) The party of the first part is to be responsible for delays caused by strikes, accidents or causes beyond its control.

(5) This contract to go into effect on 27th day of November, 1908, and continue in force until 1st day of January, 1910, and thereafter from year to year unless written notice is mailed to the address of either party, by the other, sixty (60) days prior to 1st day of January of any year, in which event upon the arrival of such date the contract is to be terminated. 8175

(6) This contract does not become binding until accepted by the E. I. DU PONT DE NEMOURS POWDER COMPANY, at its main office at Wilmington, Delaware.

E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Dale Bumstead

DOOLEY BROS.,
By R. A. Dooley.

Accepted at Wilmington, Del.,
Nov. 19, 1908.

E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Wm. Coyne.

8176 **Plaintiff's Exhibit 1247-R.**

THIS CONTRACT entered into this 30th day of November, 1908, by and between the E. I. DU PONT DE NEMOURS POWDER COMPANY, a corporation of the state of New Jersey, party of the first part, and DOOLEY BROTHERS, PEORIA, ILLINOIS, party of the second part.

(1) WITNESSETH: That the party of the first part hereby sells and the party of the second part hereby purchases all of the explosive and blast-
8177 ing supply requirements, required by the party of the second part, during the period of this contract for use of Applegate & Lewis Coal Co., of Peoria, Ills., mines at Hanna City, Ill., at the following prices:

BLASTING POWDER: 800 kegs or over, $1.10 per keg, delivered f.o.b. nearest Railway Station. Less 5c per keg commission to Dooley Brothers.

BLASTING SUPPLIES.

8178 Any other explosives or blasting supplies not specified in this contract to be furnished at current prices which are charged by the du Pont Company in the district in which the explosives or blasting supplies are to be used.

The prices herein are based on present freight rates, and present minimum carload quantity, but in case the present freight rates or present minimum carload quantity are increased or decreased during the existence of this contract, the amount of such increase or decrease shall be added to or deducted from the above prices.

The prices herein are also based on present method of packing and transporting powder, but in case the present method of packing and transporting powder is prevented by law or Railway Association regulations during the existence of this con-

tract, then in that event this contract may, at the election of the party of the first part, be terminated.

The following conditions are mutually accepted:

(2) TERMS ARE 30 days or 2% off for cash if paid within 10 days from date of invoice.

(3) It is agreed that explosives furnished under this contract are for consumption of the party of the second part only and not for sale except to its own sub-contractors or employes and that a violation of this clause gives the party of the first part the option of cancellation of this contract. 8180

(4) The party of the first part is not to be responsible for delays caused by strikes, accidents or causes beyond its control.

(5) This contract to go into effect on 30th day of November, 1908, and continue in force until 1st day of January, 1910, and thereafter from year to year unless written notice is mailed to the address of either party, by the other, sixty (60) days prior 8181 to 1st day of January of any year, in which event upon the arrival of such date the contract is to be terminated.

(6) This contract does not become binding until accepted by the E. I. DU PONT DE NEMOURS POWDER COMPANY, at its main office, Wilmington, Delaware.

E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Dale Bumstead.

DOOLEY BROS.,
By R. A. Dooley.

ACCEPTED at Wilmington, Del.,
Nov. 19, 1908.
E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Wm. Coyne.

8182 *Plaintiff's Exhibit 1247-R*

Plaintiff's Exhibit 1247-A, is a contract dated January 1, 1908, identical in all respects with Plaintiff's Exhibit 1247-R except that the customer to be supplied is the Champion Coal Company of Pekin, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs or over, $1.10 per keg, delivered f.o.b. nearest Railway Station. Carloads: 400 kegs or less than 800 kegs, $1.12½ per keg,
8183 delivered f.o.b. nearest Railway Station. Less 5c per keg commission to Dooley Bros."

The contract goes into effect Jan. 1, 1908, and continues in force to Jan. 1, 1910.

Plaintiff's Exhibit 1247-T, is a contract dated October 23rd, 1908, identical in all respects with Plaintiff's Exhibit 1247-R, except that the customer to be supplied is the Fairbury Coal Company, Fairbury, Illinois, and the prices for blasting powder are as follows:

"Blasting Powder: 800 kegs or over, $1.10 per
8184 keg delivered f.o.b. nearest Railway Station; 400 kegs and not less than 800 kegs, $1.12½ per keg, delivered f.o.b. nearest Railway Station. Less 5c per keg commission to Messrs. Dooley Brothers."

The contract goes into effect Oct. 23, 1908, and continues in force to Jan. 1, 1910.

Plaintiff's Exhibit 1247-U, is a contract dated November 29th, 1908, identical in all respects with Plaintiff's Exhibit 1247-R, except that the customer to be supplied is Harry C. Hill, Fairview, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs or over, $1.10 per keg, delievered f.o.b. nearest Railroad Station; 400 kegs or less than 800 kegs, $1.12½ per keg, delivered

f.o.b. nearest Railroad Station. Less 5c per keg commission to Dooley Brothers."

The contract goes into effect Nov. 29, 1908, and continues in force until Jan. 1, 1910.

Subdivision (3) reads: "It is agreed that explosive furnished under this contract are to be sold by the party of the second part to the mines located in and around Fairview, Illinois, and the minimum retail price to be $1.40 per keg f.o.b. Fairview, Illinois."

8186

Plaintiff's Exhibit 1247-V, is a contract dated November 30, 1908, identical in all respects with Plaintiff's Exhibit 1247-R, except that the customer to be supplied is Mapleton Coal Company (Successors to W. E. Foley, Mapleton, Illinois, and the prices for blasting powder are as follows:

"Carloads 800 kegs or over, $1.10 per keg, delivered f.o.b. nearest Railway Station. Carloads: 400 kegs or less than 800 kegs, $1.12½ per keg, delivered f.o.b. nearest Railway Station. Less 5c per keg commission to Dooley Brothers."

8187

The contract goes into effect Nov. 30, 1908, and continues in force until Jan. 1, 1910.

Plaintiff's Exhibit 1247-X, is a contract dated November 25th, 1908, identical in all respects with Plaintiff's Exhibit 1247-R, except that the customer to be supplied is Olympia Coal Company of Edwards, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs or over, $1.10 per keg, delivered f.o.b. nearest Railroad Station. Carloads: 400 kegs or less than 800 kegs, $1.12½ per keg, delivered f.o.b. nearest Railway Station. Less than 5c per keg commission to Dooley Bros."

The contract goes into effect Nov. 25, 1908, and continues in force until Jan. 1, 1910.

8188 *Plaintiff's Exhibit 1247-R*

Plaintiff's Exhibit 1247-Z, is a contract dated November 29th, 1908, identical in all respects with Plaintiff's Exhibit 1247-R, except that the customer to be supplied is Spoon River Coal Company of Ellisville, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs or over, $1.10 per keg, delivered f.o.b. nearest Railroad Station. Carloads: 400 kegs or less than 800 kegs, $1.12½ per keg,
8189 delivered, f.o.b. nearest Railroad Station. Less 5c per keg commission to Messrs. Dooley Bros."

The contract goes into effect Nov. 29, 1908, and continues in force until Jan. 1, 1910.

Plaintiff's Exhibit 1247-BB, is a contract dated November 30, 1908, identical in all respects with Plaintiff's Exhibit 1247-R, except that the customer to be supplied is Simmons Coal Company, of Canton, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs or over, $1.10 per keg, deliv-
8190 ered f.o.b. nearest Railway Station. Less 5c per keg commission to Messrs. Dooley Bros."

The contract goes into effect Nov. 30, 1908, and continues in force until Jan. 1, 1910.

Pliantiff's Exhibit 1247-CC, is a contract dated November 27th, 1908, identical in all respects with Plaintiff's Exhibit 1247-R, except that the customer to be supplied is Treasure Coal Company of Bartonville, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs or over, $1.10 per keg, delivered f.o.b. nearest Railroad Station. Less 5c per keg commission to Dooley Brothers."

The contract goes into effect Nov. 27, 1908, and continues in force until Jan. 1, 1910.

Plaintiff's Exhibit 1247-R 8191

Plaintiff's Exhibit 1247-DD, is a contract dated November 27th, 1908, identical in all respects with Plaintiff's Exhibit 1247-R, except that the customer to be supplied is George Vicary of Peoria, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs or over, $1.10 per keg, delivered f.o.b. nearest Railway Station. Carloads: 400 kegs or less than 800 kegs, $1.12½ per keg, f.o.b. delivered nearest Railway Station. Less 5c commission per keg to Dooley Bros."

The contract goes into effect Nov. 27, 1908, and 8192
continues in force until Jan. 1, 1910.

Plaintiff's Exhibit 755, is a contract dated November 29th, 1908, identical in all respects with Plaintiff's Exhibit 1247-R, except that the customer to be supplied is I. Wantling Coal Company, of Peoria, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs or over, $1.10 per keg delivered f.o.b. nearest Railroad Station. Carloads: 400 kegs or less than 800 kegs, $1.12½ per keg, f.o.b. delivered nearest Railway Station. Less commission of 5c per keg to Messrs. Dooley Brothers." 8193

This contract goes into effect Nov. 29, 1908, and continues in force until Jan. 1, 1910.

Plaintiff's Exhibit 1247-EE, is a contract dated November 30th, 1908, identical in all respects with Plaintiff's Exhibit 1247-R, except that the customer to be supplied is Winters Coal Company, Peoria, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs or over, $1.10 per keg delivered f.o.b. nearest Railway Station. Less commission of five cents (5c) per keg to Dooley Brothers."

8194 *Plaintiff's Exhibit 1247-R*

This contract goes into effect Nov. 30, 1908, and continues in force until Jan. 1, 1910.

Plaintiff's Exhibit 1247-FF is a contract dated November 30, 1908, identical in all respects with Plaintiff's Exhibit 1247-R, except that the customer to be supplied is Wolschlag Co-operative Coal Company, Peoria, Illinois, and the prices for blasting powder are as follows:

"Carloads: 800 kegs or over, $1.10 per keg delivered f.o.b. nearest Railway Station. Less 5c per
8195 keg commission to Messrs. Dooley Bros."

This contract goes into effect Nov. 30, 1908, and continues in force until Jan. 1, 1910.

Plaintiff's Exhibit 1247-V.

THIS CONTRACT entered into this 10th day of November, 1908, by and between the E. I. DU PONT DE NEMOURS POWDER COMPANY, a corporation of the State of New Jersey, party of the first part, and Messrs. Dooley Brothers, Peoria, Illinois,
8196 party of the second part.

(1) WITNESSETH: That the party of the first part hereby sells and the party of the second part hereby purchases all of the explosives and blasting supply requirements, required by the party of the second part, during the period of this contract, for use or sale in the Peoria coal mining district, at the following prices:

BLASTING POWDER, CARLOAD LOTS: f. o. b. Peoria, Illinois, direct sale to the party of the second part for local sale and distribution by the

party of the second part: 800 kegs or more, one shipment, $1.10 per keg, net; 400 kegs or less than 800 kegs, one shipment, $1.12½ per keg, net. Carload shipments: Made by the party of the first part direct to customers of the party of the second part in the Peoria coal mining district, f. o. b. nearest railroad station: 800 kegs or more, one shipment, $1.10 per keg, less 5c per keg commission to party of the second part; 400 kegs or less than 800 kegs, one shipment, $1.12½ per keg, less 5s per keg commission to party of the second part.

Any other explosives or blasting supplies not 8198
specified in this contract to be furnished at current prices which are charged by the du Pont Company in the district in which the explosives or blasting supplies are to be used.

The prices herein are based on present freight rates, and present minimum carload quantity, but in case the present freight rates or present minimum carload quantity are increased or decreased during the existence of this contract, the amount of such increase or decrease shall be added to or deducted from the above prices.

The prices herein are also based on present method of packing and transporting powder, but 8199
in case the present method of packing and transporting powder is prevented by law or railway association regulations during the existence of this contract, then in that event this contract may, at the election of the party of the first part, be terminated.

The following conditions are mutually accepted:

Party of the second part to make carload sales only to such customers as may be approved by the party of the first part.

Sales of less than carload lots by party of the second part are to be confined to Peoria County,

8200 *Plaintiff's Exhibit 1247-V*

Illinois, and to the Pekin mining district in Tazewell County, Illinois, unless special permission be first secured from party of the first part.

(4) The party of the first part is not to be responsible for delays caused by strikes, accidents or causes beyond its control.

(5) This contract to go into effect on the tenth day of November, 1908, and continue in force until thirty-first day of December, 1909, and thereafter from year to year unless written notice is mailed to the address of either party, by the other, sixty
8201 (60) days prior to thirty-fist day of December of any year, in which event upon the arrival of such date the contract is to be terminated.

(6) This contract does not become binding until accepted by the E. I. DU PONT DE NEMOURS POWDER COMPANY, at its main office at Wilmington, Delaware.

E. I. DU PONT DE NEMOURS POWDER COMPANY,

By P. H. Donnelly, Salesman,

DOOLEY BROS.
By J. B. Dooley.

8202 ACCEPTED at Wilmington, Del.,
Aug. 17, 1908.
E. I. DU PONT DE NEMOURS POWDER COMPANY,
By Chas. L. Patterson.

Exhibit 1248.

95c PRICE AUTHORIZED BY SALES BOARD FOR OPEN OR CONTRACT TRADE BETWEEN MAY 1ST, 1905, AND OCTOBER 14TH, 1907, IN CINCINNATI, CHICAGO, ST. LOUIS AND KANSAS CITY DISTRICTS.

1905

DIST.	NAME	LOCATION	DATE AUTHORIZED	REMARKS
St. Louis	Willis Coal & Mng. Co.	Belleville, Ill.		
"	" " "	Willisville, Ill.		
"	" " "	Boyden, Ill.		
"	" " "	Sparta, Ill.	5/5/05	
"	" " "	Percy, Ill.		
"	Inc. in W. C. & M. Co's Cont. is Oak Hill C. & M. Co.	Belleville, Ill.		
St. Louis	Western Anthracite C. & C. Co. covering			
"	St. Louis & O'Fallon C. Co.	Sparta, Ill.	5/9/05	
"	" " "	Belleville, Ill.		
Chicago	Harder & Hafer covering the following			
"	Keller Coal Co.	Clinton, Ind.		
"	" "	Shelburn, Ind.		
"	Union Coal Co.	Sullivan, Ind.	5/10/05	
"	No. Jackson Hill C. & M. Co.	Shelburn, Ind.		
"	Hymera C. & M. Co.	Hymera, Ind.		
"	Sullivan County C. Co.	Hymera, Ind.		
"	Glendora Mine Co.	Glendora, Ind.		
Chicago	Clinton Coal Co.	Clinton, Ind.		
"	No. Linton Coal Co.	Linton, Ind.	5/11/05	
"	Jasonville Coal Co.	Jasonville, Ind.		
"	Lewis C. & Mng. Co.	Coalmont, Ind.		
Chicago	Summit C. & M. Co.	Linton, Ind.	5/15/05	
"	Seller McClellan & Co.	Brazil, Ind.	5/15/05	
"	McClellan Sons & Co.	Clinton, Ind.	5/15/05	
"	Maple Valley Coal Co.	Clinton, Ind.	5/15/05	
"	Miami Coal Co.	Brazil, Ind.	5/15/05	
"	United C. M. Co. covering the following			
"	Rock Run Coal Co.	Mecca, Ind.	5/15/05	
"	" " "	Montezuma, Ind.		
"	Linton Bituminous C. Co.	Linton, Ind.	5/15/05	Sales B. Min. 9/18/05 lists cont. dated 8/29/05 for 1 year.
"	Dering Coal Co.	Chicago, Ill.	5/15/05	
"	Central Coal Co. covering the following			
"	Seeleyville C. & M. Co.	Seeleyville, Ind.		
"	Minshall Vein C. & M. Co.	Jessup, Ind.		
"	Raccoon Valley Mng. Co.	Coxville, Ind.	5/16/05	
"	Sugar Creek Coal Co.	W. Terre Haute,		
"	Greenfield C. & M. Co.	" " Ind.		
"	Asherville Mng. Co.	Asherville, Ind.		
"	Parke County Coal Co.	Rosedale, Ind.	5/16/05	
"	Ogara King & Co. covering the following			
"	Vivian C. & Mng. Co.	Jasonville, Ind.		
"	Linco C. & Mng. Co.	Lyford, Ind.	5/16/05	
"	Jackson Hill C. & Co. Co.	Jackson Hill, Ind.		
"	" " "	Kolsem, Ind.	5/16/05	
"	So. Indiana Coal Co.	Chicago, Ill.	5/16/05	

Plaintiff's Exhibit 1248

DIST.	NAME	LOCATION	DATE AUTHORIZED	REMARKS
Cinn.	David Ingle	Ayrshire, Ind.	5/17/05	
"	" "	Evansville, Ind.		
Chicago	Brazil Block C. Co.	Brazil, Ind.	5/17/05	
"	Cloverleaf Coal Co.	Dugger, Ind.	5/17/05	
"	Sunflower Coal Co.	Dugger, Ind.		
"	White Rose Coal Co.	Bloomfield, Ind.	5/17/05	
Chicago	West Indiana C. Co.	Linton, Ind.	5/18/05	
"	Coal Bluff Mng. Co.	Terre Haute, Ind.	5/18/05	
"	India Southern C. Co.	Chicago, Ill.	5/18/05	
Cinn.	Chesapeake Cons. Co.	Maderia, Ohio	5/18/05	
"	John M. Murphy	" "	5/18/05	
Chicago	R. S. Tennants interests as	follows		
"	Indiana Bituminous C. Co.	Turner, Ind.	5/18/05	
"	Cloverland C. & Mng. Co.	Silverwood, Ind.	5/18/05	
"	" "	Cloverland, Ind.		
Chicago	Peabody, Alwart C. M. Co.	Shelburn, Ind.	5/23/05	
"	Keystone Coal Co.	Midland, Ind.	5/23/05	
Chicago	Consolidated Indiana C. Co.	covering their interests.	5/24/05	S. B. Min. 8/22/05 lists cont. dated 7/1/05 for 1 year.
Chicago	Oak Hill C. & Mng. Co.	Clinton, Ind.	5/29/05	S. B. Min. 6/8/05 lists cont. dated 5/20/05 for 1 yr.
St. Louis	Bessemer Washed C. Co.	covering the following.		
"	Hippard Coal Co.	Belleville, Ill.		
"	Kolb Coal Co.	New Athens, Ill.		
"	Tirre C. & M. Co.	Lenzburg, Ill.		
"	Borders Coal Co.	Marissa, Ill.		
"	Johnson Coal Co.	Freeburg, Ill.		
"	" " "	Marissa, Ill.		
"	Avery C. & M. Co.	Freeburg, Ill.		
"	" " "	Belleville, Ill.		
"	" " "	Marissa, Ill.	5/31/05	
"	Tilden Coal Co.	Tilden, Ill.		
"	Crystan Coal Co.	" "		
"	J. A. Green	Coulterville, Ill.		S. B. Min. 1/26/06 authd. $1.00 price
Chicago	Marissa C. & M. Co.	White Oak, Ill.		
"	T. M. Meek Coal Co.	" " "		
St. Louis	White Walnut C. Co.	Pinckneyville, Ill.		
"	Herman Pfuhl	Belleville, Ill.		
"	D. Zihlsdorf	Marissa, Ill.		
"	Coulterville Mng. Co.	Counterville, Ill.		
St. Louis	Donk Bros. C. & C. Co.	Donkville, Ill.	6/13/05	
"	" " "	Maryville, Ill.		
Chicago	Mt. Olive & Staunton C. Co.	Staunton, Ill.	6/15/05	
"	Edwardsville Coal Co.	Edwardsville, Ill.	6/15/05	
Cinn.	Domestic Coal Company	Wellston, Ohio	6/23/05	
Chicago	Chas. F. Keefer C. Co.	Chicago, Ill.	7/20/05	
St. Louis	Chicago & Big Muddy C. & C. Co.	Marion, Ill.	7/28/05	

DIST.	NAME	LOCATION	DATE AUTHORIZED	REMARKS
Chicago	Eureka Block Coal Co.	Coal Bluff, Ind.		
"	" " " "	Linton, Ind.		
"	" " " "	Clay City, Ind.		
"	" " " "	Carbon, Ind.	8/1/05	
"	" " " "	Farmersburg, Ind.		
"	" " " "	Shirley Hill, Ind.		
"	" " " "	Perth, Ind.		
Chicago	Sullivan County C. Co.	Dugger, Ind.	8/7/05	S. B. Min. 8/22/05 lists cont. dated 8/15/05 for 1 year.
Chicago	Brazil Clay Co.	Brazil, Ind.	8/17/05	S. B. Min. 9/18/05 list cont. dated 8/26/05 for 1 year.

Plaintiff's Exhibit 1248

DIST.	NAME	LOCATION	DATE AUTHORIZED	REMARKS
Chicago	Grant C. & M. Co.	Burnett, Ind.	8/23/05	
"	Collins Coal Co.	Brazil, Ind.	8/23/05	
"	Freeman Coal Co.	Bicknell, Ind.	8/23/05	
St. Louis	Kolb Coal Co.	Mascoutah, Ill.	8/28/05	
"	" " "	Belleville, Ill.		
St. Louis	O'Gara Coal Co.	Harrisburg, Ill.		
"	" " "	Ellorado, Ill.	8/30/05	
"	" " "	Ledford, Ill.		
"	" " "	Carrier Mills, Ill.		
Cinn.	New York Coal Co.	Columbus, Ohio	9/4/05	
St. Louis	Southern Coal Co.	Belleville, Ill.		
"	" " "	Germantown, Ill.	9/5/05	
Chicago	" " "	Southern, Ill.		
St. Louis	" " "	New Baden, Ill.		
Chicago	Lincoln C. & M. Co.	Chicago, Ill.	9/11/05	S. B. Min. 9/11/05 show cont.
"	Big Vein Mng. Co.	Coalmont, Ind.	9/11/05	dated 8/1/05 for 1 year.
Kansas	Kansas City So. R. R.	Pittsburg, Kans.	9/12/05	F. O. B. Pittsburg, Kans.
Cinn.	Vandalia Coal Co.	Indianapolis, Ind.	9/14/05	
St. Louis	Albert Hucke	Belleville, Ill.	9/14/05	
Chicago	Crawford Coal Co.	Brazil, Ind.	10/2/05	
"	" " "	Center Pt., Ind.		
Cinn.	Columbus Bk. & T. C. Co.	Union Furnace, O.	10/4/05	
Cinn.	Buckeye F. B. & Clay Co.	Scioto Furnace, O.	10/9/05	
"	Peebles Paving Bk. Co.	Portsmouth, Ohio	10/9/05	
"	Richardson Neudorfer & Silcox	" "	10/9/05	
Cinn.	Nelsonville Sewer P. Co.	Nelsonville, O.	10/11/05	
Chicago	Linn Coal Co.	Bicknell, Ind.	10/12/05	
Cinn.	C. A. Simms	Maderia, Ohio	10/13/05	
"	" "	Loveland, Ohio		
Chicago	McRoy Clay Works	Brazil, Ind.	10/16/05	
"	Davis Coal Co.	" "	10/16/05	
Cinn.	The Cochran Coal Co.	Jackson, Ohio	10/16/05	
Cinn.	Peabody Coal Co.	Shawanee, Ohio	10/17/05	
Chicago	Haatt & Persons	Jacksonville, Ind.	10/19/05	
Cinn.	New Pitts Coal Co.	Columbus, Ohio	10/19/05	
"	Halley Coal Co.	Pedro, Ohio	10/19/05	
Cinn.	Sunday Creek Coal Co.	Gloucester, Ohio		
"	" " " "	Jacksonville, O.		
"	" " " "	Nelsonville, O.		
"	" " " "	Hunterdon, O.	10/20/05	
"	" " " "	Rendville, Ohio		
"	" " " "	Floodwood, O.		
"	" " " "	Chauncey, O.		
"	" " " "	Continental, O.		
Cinn.	Mahoning Ore & Steel Co.	Hibbing, Minn.	10/24/05	
"	The Black Fork C. Co.	Black Fork, Ohio	10/24/05	
"	Ada Coal Co.	Cornelia, Ohio	10/24/05	
"	Portsmouth Harbinson & Walker Co.	So. Webster, Ohio	10/24/05	
"	Tropio Mng. Co.	Deaverton, Ohio	10/24/05	
Cinn.	Emma Coal Co.	Jackson, Ohio	10/26/05	
"	Wellston Coal Co.	Wellston, Ohio	10/26/05	
Cinn.	Tom Corwin C. Co.	Glenroy, Ohio	10/27/05	
Chicago	H. L. Metzer	Jasonville, Ind.	10/30/05	
Cinn.	Alma Coal Co.	Glen Roy, Ohio	11/6/06	
"	Chapman Coal Co.	Jackson, Ohio	11/6/05	
Chicago	Vulcan Coal Co.	Linton, Ind.	11/16/05	
Chicago	Letsinger C. Co.	Jasonville, Ind.	11/17/05	
Cinn.	Elkhorn Coal Co.	Jackson, Ohio	11/27/05	
Cinn.	Logan Brick Co.	Logan, Ohio	12/1/05	
Cinn.	E. O. Roberts	Chapman, Ohio	12/4/05	
St. Louis	Willis C. & M. Co.	Murphysboro, Ill.	12/8/05	

Plaintiff's Exhibit 1248

DIST.	NAME	1906 LOCATION	DATE AUTHORIZED	REMARKS
Cinn.	The Johnson C. M. Co.	Hocking, Ohio	12/11/05	
"	Clark Bros.	Gloucester, Ohio	12/11/05	
Cinn.	The Indian Run Mng. Co.	Wellston, Ohio	12/12/05	
"	Hisylvania Store Co.	Trinble, Ohio	12/12/05	
Cinn.	McGee Coal Co.	Wellston, Ohio	12/14/05	
Cinn.	Moore & Co.	Ironton, Ohio	12/18/05	
Cinn.	Gallia Mng. Co.	Clarion, Ohio	12/22/05	
"	Hocking Mng. Co.	Carbondale, O.	12/22/05	
Cinn.	Mohr & Minton	McArthur, Ohio	12/26/05	
Cinn.	Morgan & Horton	Eiford, Ohio	12/27/05	
"	Pitts Mng. Co.	Minersville, O.	12/27/05	
Cinn.	Minshall C. M. Co.	Columbus, Ohio	12/28/05	
"	" " "	Carlton, Ohio		
"	" " "	New Lexington, O.		
	Successors to			
St. Louis	New Ohio Washed C. Co.	E. Cartersville, Ill.	1/2/06	
Cinn.	Alma Cement Co.	Wellston, Ohio	1/3/06	
St. Louis	Lumaghi Coal Co.	Collinsville, Ill.	1/10/06	
"	Williamson County C. Co.	Johnson, City, Ill.	1/10/06	S. B. Min. 2/18/06 lists cont. dated 2/3/06 for 1 year.
Cinn.	G. A. Davis & Co.	Shawnee, Ohio	1/10/06	
Cinn.	Essex Coal Co.	New Straitsville, O.	1/11/06	
"	Diamond Brick Co.	Oak Hill, Ohio	1/11/06	
Chicago	Kelly Coal Co.	Danville, Ill.	1/15/06	
Cinn.	A. Juniper & Sons	Nelsonville, O.	1/18/06	
Cinn.	Ohio F. B. Co.	Oak Hill, Ohio	1/19/06	
"	The Wellston Fuel Co.	Wellston, Ohio	1/19/06	
"	Comet Coal Co.	" "	1/19/06	
"	Manufactures Fuel Co.	Glencoe, Ohio	1/19/06	S. B. Min. 1/19/06 show cont. dated 1/1/05 for 1 year.
Cinn.	Oak Hill F. B. Co.	Oak Hill, Ohio	1/23/06	
Chicago	Bicknell Coal Co.	Bicknell, Ind.	1/22/06	
"	Illinois Collieries Co.	Virden, Ill.		
"	" " "	Chatham, Ill.		
"	" " "	Auburn, Ill.		
"	" " "	Litchfield, Ill.		
"	" " "	Springfield, Ill.		
"	Latham Coal Co.	Lincoln, Ill.	1/22/06	
"	Lincoln Coal Co.	" "		
"	Citizens C. M. Co.	Springfield, Ill.		
"	" " "	Lincoln, Ill.		
"	Pettinger Davis M. & M. Co.	Centralia, Ill.		
"	Centralia M. & M. Co.	" "		
"	Sandoval C. & M. Co.	Sandoval, Ill.		
Cinn.	The Black Diamond C. Co.	Gallia, Ohio	1/24/06	
"	Chris. Holl	Logan, Ohio	1/24/06	
Cinn.	Jones & Morgan	Jackson, Ohio	1/25/06	
Cinn.	Imperial Mng. Co.	Belle Valley, Ohio	1/29/06	
"	Princeton C. M. Co.	Princeton, Ind.	1/29/06	
Cinn.	J. C. Garland & Co.	Dayton, Ohio	2/9/06	
Chicago	Utica Cement Mfg. Co.	Utica, Ill.	2/23/06	
Chicago	Hart & Page	Rockford, Ill.	2/27/06	
"	Utica Hydraulic C. Co.	Utica, Ill.	2/27/06	S. B. Min. 2/27/06 show cont. dated 2/26/05 for 1 year.
Chicago	Silverwood Coal Co.	Silverwood, Ind.	3/1/06	
St. Louis	Chicago & Carterville C. Co.	Herrin, Ill.	3/6/06	
"	Carterville Mng. Co.	Carterville, Ill.	3/6/06	
"	Sunnyside Coal Co.	Herrin, Ill.	3/6/06	
Cinn.	Louisville Cement Co.	Milltown, Ind.	3/8/06	
"	" " "	Speeds, Ind.		
"	Williams Coal Co.	McHenry, Ky.	3/8/06	
"	Taylor Coal Co.	Taylor Mines, Ky.	3/8/06	

Plaintiff's Exhibit 1248

DIST.	NAME	LOCATION	DATE AUTHORIZED	REMARKS
Chicago	Chicago Linton C. Co.	Linton, Ind.	3/15/06	S. B. Min. 3/15/06 show cont. dated 3/1/06 for 1 yr.
St. Louis	Lake Creek Coal Co.	Johnson City, Ill.	3/19/06	
Cinn.	Valley Coal Co.	Inghams, Ohio	4/6/06	
Cinn.	The Buckeye Salt Co.	Pomeroy, Ohio	4/9/06	
Chicago	So. F. B. & Clay Co.	Hillsdale, Ind.	4/9/06	
"	C. F. Keeler Coal Co.	Atherton, Ind.	4/9/06	S. B. Min. 4/9/06 show cont. dated 5/1/06 for 1 yr.
Cinn.	Buckhorn Coal Co.	Olive Furnace, O.	4/10/06	
"	Mike Riley	Center Sta., O.	4/10/06	
St. Louis	C. G. Brechnitz	Belleville, Ill.	4/11/06	S. B. Min. dated 5/2/06 list cont. dated 4/11/06 for 1 yr.
Cinn.	Buckeye F. B. & Clay Co.	Siota Furnace, O.	4/18/06	
"	Straitsville Imp. Bk. Co.	New Straitsville, O.	4/18/06	
"	Wells Creek Supply Co.	Byesville, Ohio	4/18/06	
"	John Evans L. & S. Co.	Marion, Ohio	4/18/06	
Cinn.	Patrick Kehoe & Co.	Sandusky, Ohio	4/23/06	
Cinn.	Hillsboro Stone Co.	Hillsboro, Ohio	4/24/06	
Cinn.	Avonelle Coal Co.	Zaleski, Ohio	4/25/06	
Chicago	Carter Constr. Co.	Independence, Ind.	4/26/06	S. B. Min. 7/30/06 lists cont. dated 5/9/06 for 1 yr.
"	" " "	Moran, Ind.		
St. Louis	Odin Coal Co.	Odin, Ill.	4/30/06	
"	Boyd Coal & Coke Co.	Sparta, Ill.	4/30/06	
"	White Walnut Coal Co.	Pinckneyville, Ill.	4/30/06	
Cinn.	Henking-Bovie Co.	Gallepolis, Ohio	4/30/06	
St. Louis	Marissa C. & Mng. Co.	Marissa, Ill.	4/30/06	
"	Watson Coal Co.	Herrin, Ill.	4/30/06	S. B. Min. 6/27/06 lists cont. dated 6/9/06 for 1 yr.
"	Hemlock Coal Co.	Herrin, Ill.	4/30/06	S. B. Min. 6/28/06 lists cont. dated 6/9/06 for 1 yr.
Chicago	Spencer Stone Co.	Spencer, Ind.	5/4/06	
Cinn.	Martin & Sines	New Straitsville, O.	5/4/06	
Cinn.	Moores Lime Co.	Cold Springs, O.	5/7/06	
Chicago	Bell & Zollar Coal Co.	Centralia, Ill.	5/23/06	
St. Louis	St. Louis & O'Fallon	French Village, Ill.	5/28/06	S. B. Min. 5/28/06 show cont. dated 5/10/06 for 1 year.
St. Louis	S. B. Eaton & Co.	Du Quoin, Ill.	6/4/06	
"	Muddy Valley M. & M. Co.	Hallidayboro, Ill.	6/4/06	
"	Forester C. & C. Co.	" "	6/4/06	
"	Carterville & Big M. C. Co.	Carterville, Ill.	6/4/06	S. B. Min. dated 6/28/06 lists cont. dated 6/9/06 for 1 yr.
"	Carterville Coal Co.	" "	6/4/06	S. B. Min. 6/27/06 lists cont. dated 6/7/06 for 1 yr.
"	Donaly-Koennocke C. Co.	" "	6/4/06	
"	Bresse Trenton Mng. Co.	Breese, Ill.	6/4/06	
"	" " "	Trenton, Ill.		
Chicago	" " "	Buxton, Ill.		
St. Louis	Rutledge & Taylor C. Co.	Trenton, Ill.	6/11/06	S. B. Min. 6/27/06 lists cont. dated 6/16/06 for 1 yr.
"	" " "	Worden, Ill.		
"	Joseph Taylor	O'Fallon, Ill.	6/11/06	S. B. Min. 6/28/06 lists cont. dated 6/19/06 for 1 yr.
Cinn.	C. A. Sims & Co.	Clare, Ohio	6/11/06	
Cinn.	New England Coal Co.	Columbus, Ohio	6/12/06	
St. Louis	The Benton Coal Co.	Benton, Ill.	6/13/06	
Cinn.	R. L. Sharp Stone Co.	Columbus, Ohio	6/15/06	
St. Louis	Chicago & Marion C. Co.	Marion, Ill.	6/18/06	S. B. Min. 7/16/06 lists cont. dated 7/14/06 for 1 yr.

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DIST.	NAME	LOCATION	DATE AUTHORIZED	REMARKS
Cinn.	Aberdeen Coal Co.	Winslow, Ind.	6/21/06	
"	W. A. Gosline & Co.	Jackson, Ohio	6/21/06	
Chicago	C. Ehrlich Coal Co.	Turner, Ind.	6/21/06	S. B. Min. 11/1/06 lists cont. dated 9/29/06 for 1 yr.
Chicago	Diamond C. & Mng. Co.	Chicago, Ill.	6/22/06	
"	Prairie State C. & C. Co.	Nilwood, Ill.	6/22/06	S. B. Min. 7/16/06 lists contract dated 5/1/06 for 1 year.
"	So. Mountain Coal Co.	Petersburg, Ill.	6/22/06	
"	Athens Mining Co.	Athens, Ill.	6/22/06	
St. Louis	Centralia Coal Co.	Centralia, Ill.	6/22/06	
Chicago	Refrior Barr Co.	Ottawa, Ill.	6/22/06	
"	Wabash Coal Co.	Dawson, Ill.	6/22/06	
"	Springfield C. M. Co.	Springfield, Ill.	6/22/06	
"	Spencer Stone Co.	Sullivan, Ind.	6/22/06	
St. Louis	Summit C. & M. Co.	Belleville, Ill.	6/25/06	
"	Johnson Coal Co.	" "		
"	" " " "	Freeburg, Ill.	6/25/06	
"	" " "	Marissa, Ill.		
"	Carterville Dist. C. Co.	Marion, Ill.	6/25/06	
"	Fullerton C. & M. Co.	Belleville, Ill.	6/25/06	
"	Boehmer Coal Co., covering the following			
"	Suburban C. & M. Co	Belleville, Ill.		
"	Superior C. & M. Co.	" "	6/25/06	
"	Pittsburg Coal Co.	" "		
"	Murphy Mine	" "		
Chicago	Auburn & Alton C. Co.	Auburn, Ill.	6/27/06	
"	Tuxhorn Coal Co.	Keys, Ill.	6/27/06	S. B. Min. 7/16/06 lists contract dated 6/1/06 for 1 year.
"	Chicago Collieries Co.	Catlin, Ill.	6/27/06	
St. Louis	Chicago & Big M. C. & C. Co.	Marion, Ill.	6/27/06	S. B. Min. 6/27/06 show cont. dated 7/1/06 for 1 yr.
Chicago	" " "	Bicknell, Ind.		
Chicago	Empire Coal Co.	Viola, Ill.	6/27/06	S. B. Min. 6/27/06 show contract dated 6/9/06 for 1 yr.
Chicago	Keller Coal Co.	Chicago, Ill.	6/28/06	
"	Superior Coal Co.	Terre Haute, Ind.	6/28/06	
"	Vigo County Coal Co.	Seeleyville, Ind.	6/28/06	
"	Brazil Block Coal Co.	Brazil, Ind.	6/28/06	
"	Grant C. & M. Co.	Burnett, Ind.	6/28/06	
"	Vandalia Coal Co.	Chicago, Ill.	6/28/06	
"	Indiana So. Coal Co.	Chicago, Ill.	6/28/06	
"	Coal Bluff Mng. Co.	Terre Haute, Ind.	6/28/06	
St. Louis	Kolb Coal Co.	Mascoutah, Ill.	6/28/06	S. B. Min. 6/28/06 show cont. dated 6/18/06 for 1 yr.
"	" " "	New Athens, Ill.		
Chicago	Petersburg C. M. Co.	Petersburg, Ill.	7/2/06	
"	Cantrall Co-Oper. C. Co.	Cantrall, Ill.	7/2/06	S. B. Min. 7/30/06 lists cont. dated 5/1/06 for 1 yr.
"	Black Diamond C. Co.	Auburn, Ill.	7/2/06	S. B. Min. 11/13/06 lists cont. dated 6/1/06 for 1 year.
St. Louis	Brilliant C. & C. Co.	Du Quoin, Ill.	7/2/06	
St. Louis	Little Muddy Coal Co.	Tamaroa, Ill.	7/5/06	
Chicago	Middletown Coal Co.	Middletown, Ill.	7/10/06	
St. Louis	Silver Creek C. & M. Co.	O'Fallon, Ill.	7/11/06	S. B. M. 8/12/06 lists cont. dated 8/19/06 for 1 year.
Chicago	Superior Block C. Co.	Brazil, Ind.	7/11/06	
"	United C. M. Co.	Mecca, Ind.	7/11/06	
"	O'Gara Coal Co.	Springfield, Ill.	7/11/06	
"	Lower Vein Block C. Co.	Brazil, Ind.	7/11/06	S. B. Min. 8/13/06 lists cont. dated 8/19/06 for 1 year.
"	Collins Coal Co.	" "	7/11/06	S. B. Min. 10/3/06 lists cont. dated 8/15/06 for 1 year.

Plaintiff's Exhibit 1248

DIST.	NAME	LOCATION	DATE AUTHORIZED	REMARKS
St. Louis	Robert Dick Coal Co.	Cambria, Ill.	7/16/06	
Chicago	Woodside Coal Co.	Springfield, Ill.	7/16/06	S. B. Min. 7/16/06 show cont. dated 5/1/06 for 1 year.
"	Diamond C. & M. Co.	Hymera, Ind.	7/16/06	S. B. Min. 7/16/06 show cont. dated 7/15/06 for 1 year.
"	Wabash Coal Co.	Dawson, Ill.	7/18/06	S. B. Min. 7/16/06 show cont. dated 5/1/06 for 1 year.
"	" " "	Athens, Ill.		
"	Tirre Coal & Mng. Co.	Lenzburg, Ill.	7/16/06	S. B. Min. 7/16/06 show cont. dated 6/26/06 for 1 year.
"	Middletown Coal Co.	Middletown, Ill.	7/16/06	S. B. Min. 7/16/06 show cont. dated 6/1/06 for 1 year.
"	Luhrig Coal Co.	Luhrig, Ohio	7/16/06	S. B. Min. 7/16/06 show cont. dated 7/3/06 for 1 year.
"	Standard Washed Coal Co.	Bissell, Ill.	7/16/06	S. B. Min. 7/16/06 show cont. dated 5/1/06 for 1 year.
"	" " "	Spaulding, Ill.		
"	Calora Coal Ci.	Jasonville, Ind.	7/16/06	S. B. Min. 7/16/06 show cont. dated 6/29/06 for 1 year.
"	Jasonville Coal Co.	Cleveland, Ohio	7/16/06	
"	Springfield Coll. Co.	Springfield, Ill.	7/16/06	
"	Springfield Co-op. C. Co.	" "	7/16/06	S. B. Min. 7/30/06 lists cont. dated 5/1/06 for 1 year.
"	Queen Coal Mng. Co.	Jasonville, Ind.	7/16/06	S. B. Min. 11/28/06 lists cont. dated 11/7/06 for 1 year.
"	Sangamon Coal Co.	Springfield, Ill.	7/16/06	
Chicago	Capital Coal Co.	Springfield, Ill.	7/18/06	S. B. Min. 9/5/06 show cont. dated 5/1/06 for 1 year.
Cinn.	Ayrshire Coal Co.	Ayrshire, Ind.	7/23/06	
Chicago	Williamsville Coal Co.	Williamsville, Ill.	7/26/06	S. B. Min. 9/5/06 lists cont. dated 5/1/06 for 1 year.
Chicago	Crystal Coal Co.	Tilden, Ill.	7/30/06	S. B. Min. 8/31/06 lists cont. dated 8/2/06 for 1 year.
Cinn.	New Pittsburg Coal Co.	New Pitts., Ohio		
"	" " " "	Consol, Ohio		
"	" " " "	Buchtel, Ohio	7/30/06	S. B. Min. 7/30/06 show cont. dated 7/17/06 for 1 year.
"	" " " "	Murray City, O.		
"	" " " "	Monday, Ohio		
"	" " " "	Beaumont, Ohio		
"	Armstrong Coal Co.	Jackson, Ohio	7/30/06	S. B. Min. 7/30/06 show cont. dated 7/13/06 for 1 year.
Cinn.	Hocking Mng. Co.	Carbondale, Ohio	7/31/06	
Cinn.	Ohio Portland Cem. Co.	Cornelia, Ohio	8/2/06	
Cinn.	J. H. Sellers	Gloucester, Ohio	8/6/06	
Cinn.	The Peabody Coal Co.	McCunesville, O.	8/8/06	
Cinn.	O'Gara Coal Co.	Fairmont, Ohio		
"	" " "	Bell Valley, O.	8/9/06	
Chicago	Barclay C. & Mng. Co.	Barclay, Ill.	8/9/06	
"	Cora Coal Co.	Springfield, Ill.	8/9/06	
St. Louis	Bailey Bros. Coal Co.	Sunfield, Ill.	8/13/06	
Cinn.	Globe Iron Co.	Jackson, Ohio	8/13/06	
Cinn.	C. L. Poston	Nelsonville, Ohio	8/20/06	
Chicago	Cora Coal Co.	Andrews, Ill.	8/24/06	
"	Electric Coal Co.	Danville, Ill.	8/24/06	
"	Tilton Coal Co.	" "	8/24/06	
Cinn.	The Williams Bros. & Morse Co.	Macedonia, Ohio	8/24/06	
Chicago	Johnson City & Big Muddy C. & M. Co.	Chicago, Ill.	8/29/06	
Chicago	Rush Coal Co.	Cates, Ind.	8/31/06	S. B. Min. 8/31/06 show cont. dated 8/23/06 for 1 year.
"	A. H. Whitsett Coal Co.	Shelburn, Ind.	8/31/06	S. B. Min. 8/31/06 show cont. dated 8/4/06 for 1 year.

Plaintiff's Exhibit 1248

DIST.	NAME	LOCATION	DATE AUTHORIZED	REMARKS
"	Peabody Coal Co.	Shawnee, Ohio	8/31/06	S. B. Min. 8/31/06 show cont. dated 8/4/06 for 1 year.
"	Kettle Creek Mng. Co.	Shelburn, Ind.	8/31/06	S. B. Min. 8/31/06 show cont. dated 8/1/06 for 1 year.
"	Penn. & Indiana Coal Co.	Midland, Ind.	8/31/06	S. B. Min. 8/31/06 show cont. dated 7/30/06 for 1 year.
Cinn.	New England Coal Co.	Santoy, Ohio	9/3/06	
St. Louis	Imperial C. & Mng. Co.	Du Quoin, Ill.	9/3/06	
St. Louis	Missouri & Illinois C. Co.	Wilderman, Ill.		
"	" " "	Belleville, Ill.		
"	" " "	Rentchler, Ill.	9/5/06	S. B. Min. 9/5/06 show cont. dated 8/1/06 for 1 year.
"	" " "	Willisville, Ill.		
Chicago	Sunflower Coal Co.	Bloomfield, Ind.	9/5/06	
"	Harrison C. & Mng. Co.	Clay City, Ind.	9/5/06	
"	Newsam Bros.	Peoria, Ill.	9/5/06	
"	Blue Mound C. Co.	Blue Mound, Ill.	9/5/06	
Cinn.	Gallia Mng. Co.	Clarion, Ohio	9/13/06	
Chicago	P. F. Sullivan	Linton, Ind.	9/13/06	
Cinn.	Cochran & Pinkerton	Malta, Ohio	9/19/06	
Chicago	S. Wolschlag & Bros.	Peoria, Ill.	9/30/06	
St. Louis	Forester C. & C. Co.	Du Quoin, Ill.		
Chicago	Big Creek Coal Co.	St. David, Ill.	9/26/06	
Cinn.	Dayton Coal & Iron Co.	Wellston, Ohio		
St. Louis	Breese-Trenton Mng. Co.	Beckmeyer, Ill.	10/1/06	
St. Louis	Buckeye Coal Co.	Coalton, Ohio	10/3/06	
Chicago	Lower Vein Coal Co.	W. Terre Haute, Ind.	10/3/06	S. B. Min. 10/3/06 show cont. dated 9/15/06 for 1 year.
"	Sullivan County C. Co.	Dugger, Ind.	10/3/06	S. B. Min. 10/3/06 show cont. dated 9/15/06 for 1 year.
"	Brazil Clay Co.	Brazil, Ind.	10/3/06	S. B. Min. 10/3/06 show cont. dated 8/25/06 for 1 year.
St. Louis	Majestic C. & C. Co.	Du Quoin, Ill.	10/5/06	
Chicago	West End Coal Co.	Springfield, Ill.	10/9/06	
"	Clinton Coal Co.	Clinton, Ind.	10/9/06	
"	Monmouth Coal Co.	Bereton, Ill.	10/9/06	
"	The Coalfield Co.	Coal City, Ill.	10/9/06	
St. Louis	Columbus Quarry Co.	St. Louis, Mo.	10/12/06	
Cinn.	Superior Coal Co.	Wellston, Ohio	10/12/06	
Chicago	Smith Lohr. C. Mng. Co.	Chicago, Ill.	10/22/06	
St. Louis	Borders Coal Co.	Marissa, Ill.	10/24/06	
Chicago	Rush Coal Co.	Toledo, Ohio	10/26/06	
"	United Coal Mng. Co.	Chicago, Ill.	10/26/06	
"	Bradfield & Dixon	Mecca, Ind.	10/26/06	
St. Louis	Donk Bros. C. & C. Co.	Troy, Ill.	11/1/06	
Cinn.	Superior Port. Cem. Co.	Bartles, Ohio	11/1/06	
Chicago	Peabody Alwart C. Mng. Co.	Shelburn, Ind.	11/1/06	
"	Krapp & Less	Coal Valley, Ill.	11/1/06	
"	Cayuga Bk. & Coal Co.	Cayuga, Ind.	11/1/06	S. B. Min. 11/1/06 show cont. dated 10/6/06 for 1 year.
St. Louis	So. Coal & Mng. Co.	Belleville, Ill.		
"	" " "	New Baden, Ill.	11/1/06	S. B. Min. 11/1/06 show cont. dated 10/1/06 for 1 year.
"	" " "	Germantown, Ill.		
Chicago	Grant Coal Mng. Co.	Burnett, Ind.	11/1/06	
St. Louis	Hafer Washed C. Co.	Carterville, Ill.	11/5/06	S. B. Min. 11/1/06 show cont. dated 10/11/06 for 1 year.
Cinn.	The Hocking Coal Ex. & Mng. Co.	Buchtel, Ohio	11/5/06	
Chicago	Spring Creek Coal Co.	Springfield, Ill.	11/5/06	
Chicago	Vulcan Coal Co.	Indianapolis, Ind.	11/13/06	
"	Knox Coal Co.	Bicknell, Ind.	11/13/06	
Cinn.	Moore & Co.	Ironton, Ohio	11/13/06	
Chicago	Decatur Coal Co.	Decatur, Ill.	11/13/06	S. B. Min. 11/13/06 show cont. dated 9/[illegible]/06 for 1 year.

Plaintiff's Exhibit 1248

DIST.	NAME	LOCATION	DATE AUTHORIZED	REMARKS
"	Tallula Coal Co.	Yallula, Ill.	11/13/06	S. B. Min. 11/13/06 show cont. dated 9/1/06 for 1 year.
"	Carlisle Coal & Clay Co.	Carlisle, Ind.	11/13/06	S. B. Min. 11/13/06 show cont. dated 10/27/06 for 1 yr.
St. Louis	Jones Bros. C. & M. Co.	Marissa, Ill.	11/26/06	
Chicago	Norris Coal Mng. Co.	Norris, Ill.	11/28/06	S. B. Min. 11/28/06 show cont. dated 8/1/06 for 1 year.
St. Louis	Miller-Horn Coal Co.	Du Quoin, Ill.	12/3/06	
Chicago	Roanoke C. & Mng. Co.	Roanoke, Ill.	12/6/06	
Chicago	The Jones & Adams Co.	Springfield, Ill.	12/14/06	
St. Louis	Southern C. & M. Co.	Miller Sta., Mo.	12/14/06	

1907

DIST.	NAME	LOCATION	DATE AUTHORIZED	REMARKS
Chicago	Zeller McClellan & Co.	Brazil, Ind.	1/3/07	S. B. Min. 1/3/07 shows cont. dated 1/4/07 for one year.
Chicago	Northern Fuel Co.	Jacksonville, O.	1/3/07	S. B. Min. 1/3/07 shows cont. dated 12/29/06 for one year.
Chicago	New England Coal Co.	San Toy, O.	1/3/07	S. B Min. 1/3/07 shows cont. dated 12/29/06 for one year.
St. Louis	Southern Coal M. Co.	St. Louis, Mo.	1/3/07	
Cinn.	Silver Run Coal Co.	Silver Run, O.	1/3/07	
St. Louis	Rutledge & Taylor C. Co.	Trenton, Ill.	1/8/07	
St. Louis	Hafer Washed Coal Co.	Carterville, Ill.	1/8/07	
St. Louis	Ziegler Dist. Coll. Co.	Christopher, Ill.	1/8/07	
St. Louis	Sesser Constr. Co.	Chicago, Ill.	1/10/07	
St. Louis	Greenwood-Davis C. Co.	Du Quoin, Ill.	1/15/07	
Chicago	Eureka Block Coal Co.	Perth, Ind.	1/15/07	S. B. Min. 1/15/07 shows cont. dated 1/10/07 for one year.
Chicago	Knox Coal Co.	Bicknell, Ind.	1/15/07	S. B. Min. 1/15/07 shows cont. dated 1/1/07 for one year.
St. Louis	Borders Coal Co.	St. Louis, Mo.	1/15/07	S. B. Min. 8/1/07 lists cont. dated 7/12/07 for one year.
St. Louis	Sligo Furnace Co.	St. Louis, Mo.	1/15/07	
Cinn.	Buckhorn Coal Co.	Buckhorn, O.	1/15/07	
Chicago	Grant Coal & Mng. Co.	Burnett, Ind.	1/22/07	
Cinn.	Chicago & Hocking C. Co.	Columbus, O.	1/29/07	
Chicago	Illinois Coll. Co.	Auburn, Ill.	1/29/07	
Chicago	Williamsville C. Co.	Williamsville, Ill.	1/29/07	
Chicago	Barclay C. & Mng. Co.	Barclay, Ill.	1/29/07	
Chicago	Vandalia Coal Co.	Indianapolis, Ind.	1/29/07	
St. Louis	Tirre C. & Mng. Co.	Lenzburg, Ill.	2/5/07	S. B. Min. 8/1/07 lists contract dated 7/3/07 for 1 year.
Chicago	Coal Bluff Mng. Co.	Fontanet, Ind.	2/5/07	S. B. Min. 2/5/07 shows contract dated 1/5/07 for 1 year.
"	" " " "	Coal Bluff, "		
Chicago	Star Coal Co.	Streator, Ill.	2/5/07	
Chicago	Vivian C. & Mng. Co.	Chicago, Ill.	2/5/07	
Chicago	Canton Coal Co.	Canton, Ill.	2/5/07	
Chicago	United C. & Mfg. Co.	Chicago, Ill.	2/5/07	
St. Louis	Carterville Dist. C. Co.	Marion, Ill.	2/7/07	S. B. Min. 4/18/07 lists cont. dated 4/10/07 for one year.
Chicago	Woodside Coal Co.	Springfield, Ill.	2/7/07	
Chicago	Parke Co. Coal Co.	Rosedale, Ind.	2/7/07	S. B. Min. 2/12/07 shows cont. dated 1/28/07 for one year.
Chicago	Hudson C. & Mng. Co.	Chicago, Ill.	2/12/07	
Chicago	Lincoln Mng. Co.	Lincoln, Ill.	2/19/07	
Cinn.	Chicago & Hocking C. Co.	Corning, Ohio	2/26/07	

Plaintiff's Exhibit 1248

DIST.	NAME	LOCATION	DATE AUTHORIZED	REMARKS
Chicago	Horney & Winterbottom	Washington, Ind.	3/5/07	
Cinn.	F. H. Blodgett & Co.	Alpine, Ky.	3/5/07	
Cinn.	New Pitts Coal Co.	Columbus, O.	3/21/07	
Chicago	John McVey	Danville, Ill.	3/21/07	
Chicago	Clarke C. & C. Co.	Bartlett, Ill.	3/26/07	
Kansas C.	Western C. & Mng. Co.	Corono, Mo.	3/26/07	
Cinn.	New Pitts Coal Co.	New Pittsburgh, O.	3/28/07	
"	" " " "	Monday, O.		
"	" " " "	Orbiston, O.		
"	" " " "	Murray, O.		
"	" " " "	Consol, O.		
Cinn.	Breakwater Const. Co.	Sandusky, O.	4/2/07	
Chicago	Clarke Coal & C. Co.	Peoria, Ill.	4/2/07	
Cinn.	The Ironclay Brick Co.	Shawnee, O.	4/16/07	
St. Louis	United Coal Mng. Co.	Christopher, Ill.	4/18/07	
"	Muddy Valley M. & M. Co.	Hallidayboro, Ill.	4/18/07	
St. Louis	Paradise C. & C. Co.	DuQuoin, Ill.	4/18/07	S. B. Min. 4/18/07 shows cont. dated 4/4/07 for 60 days.
St. Louis	Western Lime Works	St. Genevieve, Mo.	4/25/07	S. B. Min. 4/18/07 shows cont. dated 4/4/07 for 60 days.
St. Louis	Imperial Coal & Mng. Co.	DuQuoin, Ill.	4/30/07	
Cinn.	B. R. Billingsley	Wellston, O.	4/30/07	
St. Louis	G. W. Bigger	Marceline, Mo.	5/7/07	
Cinn.	Bristol Coal Co.	Newark, Ohio	5/7/07	
Cinn.	Kentucky C. M. Co.	Waverly, Ky.	5/7/07	
St. Louis	St. L. Port. Cement Co.	St. Louis, Mo.	5/14/07	
Chicago	O'Reilly Callahan & Given	Swits City, Ind.	5/14/07	
Chicago	Smith Lobo. C. Mng. Co.	Pana, Ill.	5/14/07	
Chicago	Avery Coal & Mng. Co.	White Oak Sta., Ill.	5/16/07	
Cinn.	Potaka River C. & C. Co.	Hartwell Jct., Ind.	5/21/07	
Cinn.	S. T. Copenhaver	Middletown, O.	5/21/07	
Cinn.	Ironclay Brick Co.	Shawnee, Ohio	5/21/07	
St. Louis	Avery C. & Mng. Co.	St. Louis, Mo.	5/23/07	
Kansas C.	The West Coal Co.	Pittsburgh, Kans.	5/30/07	
St. Louis	Saline Co. Coal Co.	Ledford, Ill.	6/11/07	
Cinn.	The Cochran & Pinkerton Co.	McConnellsville, O.	6/11/07	
Cinn.	Carter Constr. Co.	Indianapolis, Ind.	6/11/07	
St. Louis	Johnson Coal Co.	St. Louis, Mo.	6/13/07	S. B. Min. 6/11/07 shows cont. dated 5/9/07 for one year.
St. Louis	Mo. & Ill. Coal Co.	Willisville, Ill.	6/20/07	
"	Boehmer Coal Co.	Belleville, Ill.	6/20/07	
"	Carterville Coal Co.	Carterville, Ill.	6/20/07	S. B. Min. 6/20/07 shows cont. dated 6/13/07 for one year.
Chicago	T. J. O'Gara	Lyford, Ind.	6/20/07	S. B. Min. 6/20/07 shows cont. dated 6/6/07 for one year.
St. Louis	Breese-Trenton M. Co.	Beckemeyer, Ind.	6/20/07	S. B. Min. 6/20/07 shows cont. dated 6/4/07 for one year.
"	" " "	Breese, Ind.		
"	" " "	Trenton, Ill.		
St. Louis	Paradise C. & Mng. Co.	Winkle Sta., Ill.	6/25/07	S. B. Min. 6/20/07 shows cont. dated 6/1/07 for one year.
St. Louis	Jupiter C. & Mng. Co.	DuQuoin, Ill.	7/2/07	
Kansas C.	The J. R. Rowe C. Mng. Co.	Cherokee & Crawford Counties, Kas.	7/2/07	S. B. Min. 7/2/07 shows cont. dated 6/24/07 for one year.
St. Louis	Johnson & Allen C. Co.	Cutler, Ill.	7/2/07	S. B. Min. 7/2/07 shows cont. dated 7/1/07 for one year.
Kansas C.	The Cherokee & Pitts C. & Mng. Co.	Crawford Co., Ill.	7/18/07	S. B. Min. 7/18/07 shows cont. dated 6/1/07 for one year.
Kansas C.	Mo. Kas. & Tex. Ry.	Parsons, Kans.	7/25/07	
"	" " " "	Mineral, Kans.		
Chicago	Indiana Sun. Coal Co.	Gilmore, Ind.	7/25/07	
Chicago	Jos. Taylor Coal Co.	O'Fallon, Ill.	8/1/07	

Plaintiff's Exhibit 1248

DIST.	NAME	LOCATION	DATE AUTHORIZED	REMARKS
Chicago	Chg. & Big Muddy C. & C. Co.	Becknell, Ind.	8/1/07	S. B. Min. 8/1/07 shows cont. dated 7/5/07 for one year.
St. Louis	" " " "	Marion, Ill.		S. B. Min. 8/1/07 shows cont.
St. Louis	Kolb Coal Co.	Mascoutah, Ill.		dated 7/1/07 for one year.
"	" " "	New Athens, Ill.	8/1/07	
"	" " "	Berkners, Ill.		S. B. Min. 8/1/07 shows cont.
St. Louis	Benton Coal Co.	Benton, Ill.	8/8/07	dated 7/19/07 for one year.
				S. B. Min. 8/8/07 shows cont.
St. Louis	Fullerton Coal Co.	Belleville, Ill.	8/15/07	dated 7/26/07 for one year.
St. Louis	Cluley Miller Coal Co.	Furmans, Ill.	8/15/07	
Cinn.	Straitsville Imperv. Bk. Co.	New Straitsville, O.	8/15/07	
St. Louis	Centralia Coal Co.	Centralia, Ill.	8/22/07	
St. Louis	Co-operative Coal Co.	Breese, Ill.	8/22/07	
Cinn.	Hocking Fuel Co.	Gore, Ohio	9/3/07	
St. Louis	Robt. Dick Coal Co.	Cambria, Ill.	9/5/07	
Kansas C.	Fidelity C. Mng. Co.	Stone City, Kan.		
"	" " "	Soammon, Kans.	9/10/07	
Cinn.	Gem Coal Co.	Greendale, O.	9/26/07	
Cinn.	Geo. Gibbs	Shawnee, O.	10/1/07	
"	S. B. Baker	Longstreth, O.	10/1/07	
St. Louis	Sou. C. & Mng. Co.	Belleville, Ill.		
"	" "	New Baden, Ill.	10/8/07	
"	" "	Germantown, Ill.		

Plaintiff's Exhibit 1300.

(Being summary of Plaintiff's Exhibits 1130 to 1137—also known as Government's Exhibits 17 to 24—Relating to Contracts).

DELIVERIES ON EXPIRED CONTRACTS:

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT.

Exhibit No. 1130 (Gov. Ex. No. 17).															
Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. # Page No.	Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
Big Muddy C. & I. Co., St. Louis Mo.	2/15/00	1 Yr.	1.25	15	1.10	13389	Equit.	1229 1338							
Biwabik Ore Co., Biwabik, Minn.	6/2/99	2 "		12½		4000	Ohio	1201	6/2/99 12/16/02	2 Yr. 2 "	1.42½	12½	1.30 1.30	Ohio "	77 78
Black Diamond Coal Co., Springfield, Ills.	1/1/01	1 "	1.25	10	1.15	7000	L. & R.	1251							
Brannan, A. & Son, Bridgeport, Ohio	4/19/01	1 "	1.25	10	1.15	1700	du Pont	1281	4/19/01	1 "	1.25	10	1.15	du P. & Co.	79
Brown, C. C., Petersburg, Ills.	5/1/99	3 "	1.25	10	1.15	800	"		5/1/04	3 "			1.15		1143
Browning, J. L., Pocahontas, Va.	7/11/99	3 "	1.30	20	1.10	900	"	1203							
Cable & Co., Cable, Ills.	7/1/99	3 "	1.25	15	1.10	10100	Hazard								
Cahaba South. Mfg. Co., Hargroove, Ala.	1/1/98	1 "	1.35	15	1.20	3600	Sycamore	1106							
Canton Union C. & C. Co., Canton, Ills.	4/1/01	1 "	1.25	05	1.20	1717	Phoenix	1286	8/1/03 1/1/08	3 " 1 "	1.35 1.05	10	1.25 1.05	du P. Co. du P. Co.	720 721-3
Chic. Wilmington & Vermil. C. Co., Chicago, Ills.	8/26/99	2 "	1.25	15	1.10	5500	Ohio	1197							
Christy, C. Co., Des Moines, Iowa	5/1/99	3 "	1.35	10	1.25	2600	du Pont	1199	5/1/99	3 "	1.25	10	1.15	du P. & Co.	80
Coaldale C. & C. Co., Coaldale, West Va.	7/14/97	2 "	1.30	20	1.10	5000	King	1080							
Coffeyville Vitrified B. & C. Co., Cherryvale, Kan.	4/27/01	1 "	1.25	10	1.15	800	du Pont	1295							
Crawford C. Co., Brazil, Ind.	11/3/98	2 "	1.25	20	1.05	5000	Ohio	1177	12/16/02	2 "			1.15	Ohio	81

Plaintiff's Exhibit 1300

Dana, J. E., Cosburg, West Va.	7/28/97	2 "	1.25	15	1.10	3900	King	1079 1269							
Davison & Fulton, Sparta, Ills.	1/7/01	1 "	1.25	05	1.20	1400	Phoenix	1337							
Dayton C. & I. Co., Ltd., Dayton, Tenn.	1/28/01	1 "	1.35	25	1.10	3300	Chatt.	1325	3/20/01	1 "	1.25	05	1.20	du P. & Co.	82
Dick Robt. Coal Co., Carterville, Ills.	3/20/01	1 "	1.25	05	1.20	800	du Pont	1289	3/20/02 6/22/03	1 " 1 "	1.25 1.35	05 10	1.20 1.25	" "	82 83
Western Antra C. & C. Co., Du Quoin, Ills.	6/15/98	2 Yr.	1.25	15	1.10	6400	Phoenix								
Eagle C. Co., Lexington, Ky.	1/1/00	2 "	1.30	15	1.15	5600	Chatt.								
East Tenn. C. Co., Jellico, Tenn.			1.35	10	1.25	800	du Pont	1294							
Ehrlick, Jul., Seeleyville, Ind.	11/10/99	2 "	1.25	20	1.05	1600	Ohio	1219							
Ellsworth, J. W. & Co., Mich., W. Va. & Pa.	7/10/00	2 "		15		3200	Austin	1284							
Francy, John Co., Toronto, Ohio	4/18/01	1 "	1.25	10	1.15	2250	du Pont	1294	4/18/01	1 Yr.	1.25	10	1.15	du P. & Co.	84
Gen. Hocking C. Co., Columbus, Ohio	12/8/98	3 "	1.25	15	1.10	400	King		5/22/01	1 "	1.35	10	1.25	"	855
Great Elk C. Co., Carbon Hill, Ala.	5/22/01	1 "	1.35	10	1.25	800	du Pont	1295	5/22/02 6/23/03	1 " 3 "	1.35 1.45	10 10	1.25 1.35	" "	86 87
Illinois Fuel Co., Sparta, Ills.	1/5/01	1-4mo.	1.25	05	1.20	1600	Phoenix	1301							
Jackson Hill C. & C. Co., Jackson Hill, Ind.			1.25	15	1.10	400	Hazard		4/1/99	2 "	1.25	15	1.10	"	88
Jefferson & Clearfield C. & I. Co., Rochester, N. Y.	4/1/99	2 Yr.	1.25	20	1.05	13500	du Pont		4/10/01	1 "	1.25	15	1.10	"	89
Kansas & Texas Coal Co., Missouri	7/1/99	3 "		20		91050	Equit.	1207							
Kelley, A. F., Pa.	5/26/01	1 "	1.25	20	1.05	7000	du Pont	1363	5/26/01	1 "	1.25	15	1.10	"	92

Plaintiff's Exhibit 1300

DELIVERIES ON EXPIRED CONTRACTS.

(Exhibit No. 1130, Gov. Ex. No. 17)

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Last Ex's P. 3 Page No.	Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
Kerens-Donnewald C. Co., Worden, Ills.	6/1/01	9 mo.	1.25	10	1.15	1732	Phoenix	1375							
Kramm, C. B. & Bros., Edwards, Ills.	4/1/01	1 Yr.	1.25	05	1.20	1483	"	1286	8/1/03	3 "	1.35	10	1.25	du P. Co.	1070
Logan Cons. C. Co., Roanoke, Va.	10/25/00	1 "	1.35	10	1.25	4400	King	1240 1356							
Lorain Coal & Dock Co., Bridgeport, Ohio			1.25	15	1.10	4400	Ohio	1324							
McAllester, C. M. Co., Buck, I. T.			1.50	20	1.30	7200	L. & R. & du Pont								
McCormick, L., Monongahela City, Pa.	4/22/01	1 "	1.25	12½	1.12½	3800	du Pont	1309							
McDougall, J. B., Coalgate, I. T.	9/13/97	2 "	1.50	15	1.35	17600	Ohio	1079							
McElhose & McCracken, Pennsylvania	6/28/97	2 "	1.25	20	1.05	800	Ohio	1079							
McHenry Coal Co., McHenry, Ky.	8/3/99	2 Yr.	1.30	15	1.15	2400	Chatt.	1210							
Madison Coal Co., St. Louis, Mo.	6/3/98	2 "	1.25	15	1.10	6755	Equit.								
Mahoning Ore & Steel Co., Hibbing, Minn.	7/3/99	1 "	1.42½	12½	1.30	5913	Ohio	1205							
Means Kyle & Co., Hanging Rock, O.	11/16/97	2 "	1.25	15	1.10	400	"	1079							
Mingo Coal Mg. Co., Alma Sdg., W. Va.	4/15/01	1 "		05		1300	Hazard	1275							

Moweaqua C. M. & Mfg. Co., Moweaqua, Ills.	2/10/00	1-1 mo.	1.25	15	1.10	2150	Equit.	1216							
National C. & I. Co., West End C. Co., Springfield, Ills.	5/1/99	3 Yr.	1.25	10	1.15	4000	du Pont	1199	10/1/03				1.15		1143
Wild Rose C. Co., Des Moines, Iowa			1.35	10	1.25	800	"	1207							
Williams Coal Co., McHenry, Ky.	5/8/00		1.30	05	1.25	800	Chatt.								
Williamsville Coal Co., Williamsville, Ills.	5/1/00	2 Yr.	1.25	10	1.15	3650	du Pont	1247	5/1/03	3 Yr.			1.20		1143
Winston Brothers & Dear, Mesaba Range, Minn.				12½		1190	Lake Sup.	1205							
Wolschlag & Brother, Peoria, Ills.	4/1/01	1 Yr.	1.25	05	1.20	3770	Phoenix	1286	8/1/03 11/30/07 11/30/08	3 Yr. 1 " 1 "			1.17½ 1.05 1.10	du.P P. Co. " "	1143 P EE
Woodward Iron Co., Woodward, Ala.	1/27/00	2 "	1.35	20	1.15	1800	du Pont								
Zeire, J. B., Cleveland, Ohio	3/1/01	1 "	1.25	10	1.15	700	Austin	1285							
Orr, John Sons, Steubenville, Ohio	3/5/01	1 "	1.25	10	1.15	2909	du Pont	1294	3/5/01	1 Yr.	1.25	10	1.15	du P & Co.	93
O'Brien & Sheehan, Plattsburg, N. Y.	3/25/99		1.23	15	1.10	400	Hazard	1193 1227							
Eureka Supply Co., Philadelphia, Pa.	12/13/99	2 "	1.15 (or 1.05)			8000	L. & R.	1373							
						411658									

Plaintiff's Exhibit 1300

CONTRACTS EXPIRING PERIOD ENDING DEC. 31, 1912

(Exhibit No. 1131, Gov. Ex. No. 18)

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.	Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
Turnback Hdwe. Co., J. H., Phillipsburg, Pa.	4/9/01	20 Mo.	1.25	10	1.15	3750	L. & R.								
Carlinville C. Co., Carlinville, Ills.	11/28/00	2 Yr.	1.25	10	1.15	3950	Equit.								
Chapman Coal Co., Pittsburg, Kansas	12/17/01	1 "	1.35	15	1.20	2400	"								
Eaton, S. B., Du Quoin, Ills.	10/22/00	2 "	1.25	15	1.10	3800	Oriental	1264							
Eldon C. & M. Co., Ottumwa, Iowa	9/21/00	2 "	1.35	05	1.30	0	L. & R.	1259							
Empire C. & C. Co., Empire, Ala.	10/5/01	1 "	1.35	10	1.25	0	Birmingham								
Federal Supply Co., Pittsburg, Pa.	7/17/00	2 "	1.25 (or 1.05)	20	1.05 (or .80)	16898	Ohio								
Grady Trading Co., Indian Ty.	5/9/02	7 Mo.	1.50	20	1.30	17000	du Pont	1246	5/9/00	2 Yrs.	1.50	20	1.30	du P.&Co.	113
									4/16/02	7 Mos.	1.50	20	1.30	"	112
									12/15/02	1 Yr.			1.30	"	111
									12/10/03	2 Yrs.	1.60	20	1.40	"	110
Green Hill C. Co., Sullivan, Ind.	9/11/01	1 Yr.	1.25	15	1.10	)	Miami	1332							
Horns Colliery Co., Du Quoin, Ills.	10/13/99	3 "	1.25	10	1.15	1400	King	1208							
Hulle, C. E., Salem, Ills.	12/11/99	3 "	1.25	10	1.15	400	du Pont								
Kilpatrick Bros. & Collins, Beatrice, Nebr.	9/5/00	2 "	1.40	15	1.25	2000	American								
LaFollette C. I. & Ry. Co., La Follette, Tenn.	12/24/01	1 "	1.35	15	1.20	2950	Hazard	1376							
McKinney, F. O., Prest., Zanesville, Ohio	10/11/00	2 "	1.25	15	1.10	2800	Miami								
McGuffin, J. A., Sewell, W. Va.	9/1/00	2 "	1.25	15	1.10	5800	Hazard	1267							
Milner C. & Ry. Co., New Castle, Ala.	10/5/01	1 "	1.35	10	1.25	)	Birmingham								

Plaintiff's Exhibit 1300

Foston, C. L., Nelsonville, Ohio	9/26/00	2 "	1.25	15	1.10	3200	Ohio	1259	9/1/00 9/24/02	2 Yr. 3 "	1.40 1.40	10 10	1.30 1.30	du P.& Co. "	114 115
Prairie Creek C. Co., Huntingdon, Ark.	9/1/00	2 "		10		5600	du Pont	1249 1227							
Rock Run C. Co., Brazil, Ind.	12/9/99	3 "	1.25	15	1.10	1600	King	1319							
					(1131—1)										
Pineville, Ky.			1.35	10	1.25	1700	du Pont	1336							
Orbrick, J. C. & Son, Cumberland, Md.	1/7/01	1 Yr.	1.35	15	1.20	300	"	1294							
Orange Trading Co., Kribbs, I. T.	2/20/00	2 "	1.50	17½	1.32½	1000	Oriental		5/1/99 5/1/03	3 Yrs. 3 "	1.25	15	1.10 1.30	du P. & Co.	94 1143
Oskaloosa C. M. Co., Oscaloosa, Iowa	5/1/99	3 "	1.35	15	1.20	3000	du Pont	1215							
Perry Brothers, Coalgate, I. T.			1.50	15	1.35	4000	Ohio								
Pineville Coal Co., Pineville, Ky.	10/17/00		1.35	10	1.25	2000	Chatt.								
Poplar Creek Coal Co., Oliver Springs, Tenn.	5/5/00		1.35	15	1.20	450	"		5/1/99 5/1/02	3 Yr. 3 "	1.25 1.25	10 15	1.15 1.10	Dup. & Co. "	96 97
Ramsay, George H., Iowa	5/1/99	3 Yr.		15		5000	du Pont	1207	5/1/03	3 "	1.35	17½	1.17½	"	98
Rend, W. P., Chicago, Ills.	12/5/99	2 "	1.25	15	1.10	6200	Ohio								
Republic S. & I. Co., Birmingham, Ala.	5/18/00		1.35	10	1.25	1600	Chatt.	1245							
Reynolds, J. H., Boonville, Mo.	5/25/01		1.35	10	1.25	6400	Austin	1323							
Royster & Ziegler, Peoria, Ills.	1/26/01	1 Yr	1.25	05	1.20	1715	Phoenix		12/11/99 4/14/03	3 Yr.	1.25 1.35	10 15	1.15 1.20	DuP. & Co. "	99 100
Sandoval, C. & M. Co., Sandoval, Ills.			1.25	10	1.15	4000	du Pont	1228							
Seeleyville C. & M. Co., Seeleyville, Ind.			1.25	15	1.10	400	Ohio	1270							

(1130—3)

Plaintiff's Exhibit 1300

DELIVERIES ON EXPIRED CONTRACTS:

(Exhibit No. 1130, Gov. Ex. No. 17)

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.	Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
Smoky Hollow Coal Co., Avery, Iowa			1.35	15	1.20	11000	Oriental	1204							
Snow Shoe Mining Co., Snow Shoe, Pa.	3/26/01	1 Yr.	1.25	10	1.15	2000	du Pont	1281	10/17/03 3/26/01	3 Yr. 1 "	1.25	10	1.25 1.15	du P.& Co.	1143 101
Spaulding Coal Co., Spaulding, Ills.	5/1/99	3 "	1.25	10	1.15	3500	"	1199	5/1/03	3 "			1.15		1143
Standard Iron Co., Goodrich, Tenn.			1.35	15	1.20	400	Chatt.	1380							
Star Coal Co., Streator, Ills.	5/1/99	3 "	1.25	10	1.15	5320	du Pont	1206	5/1/99 5/1/02	3 " 3 "	1.35 1.25	10 10	1.25 1.15	" do	104 105
Star C. & C. Co., Red Star, West Va.			1.25	10	1.15	360	Hazard	1311	5/1/03	3 "			1.17½		1143
Steel & Co., Pennsylvania	3/16/01	1 "	1.25	15	1.10	6000	du Pont & Oriental	1286							
Stull Hill Coulter Co., Leechburg, Pa.	3/21/01	1 "	1.25	15	1.10	6140	du Pont	1363	3/21/01	1 "	1.25	10	1.15	du P.& Co.	106
Taylor Supply Co., Ltd., Uniontown, Pa.	3/18/01	1 "	1.25	15	1.10	1615	"	1288	3/18/01	1 "	1.25	10	1.15	du P.& Co.	107
Tennessee C. Co., Knoxville, Tenn.	10/16/00		1.35	10	1.25	1200	Chatt.								
Thropp, J. E., Keanny, Pa.	4/17/01	1-8 mo.	1.25	10	1.15	400	L. & R.	1304							
Turkey Knob Coal Co., Loup Creek, West Va.			1.25	15	1.10	600	Hazard	1302							
Union Pac. C. Co., Omaha, Neb.	5/21/01	1 Yr.	1.35	15	1.20	38650	du Pont								

Plaintiff's Exhibit 1300

Van Kirk C. & M. Co., Mineral City, O.	11/27/00	11 mo.	1.25	10	1.15	2650	Austin	1266							
West End C. Co., Springfield, Ills.	5/1/99	3 Yr.	1.25	10	1.15	4000	du Pont	1199	10/1/03				1.15		1143
Wild Rose C. Co., Des Moines, Iowa			1.35	10	1.25	800	"	1207							
Williams Coal Co., McHenry, Ky.	5/8/00		1.30	05	1.25	800	Chatt.								
Williamsville Coal Co., Williamsville, Ills.	5/1/00	2 "	1.25	10	1.15	3650	du Pont	1247	5/1/03	3 Yr.			1.20		1143
Winston Brothers & Dear, Mesaba Range, Minn.				12½		1190	Lake Sup.	1205							
Wolschlag & Brother, Peoria, Ills.	4/1/01	1 "	1.25	05	1.20	3770	Phoenix	1286	8/1/03	3 "			1.17½D		1143
									11/30/07	1 "			1.05D	duP.Pdr.Co.	P
									11/30/08	1 "			1.10D	"	EE
Woodward Iron Co., Woodward, Ala.	1/27/00	2 "	1.35	20	1.15	1800	du Pont								
Zeire, J. B., Cleveland, Ohio	3/1/01	1 "	1.25	10	1.15	700	Austin	1285							
Orr, John Sons, Steubenville, Ohio	3/5/01	1 "	1.25	10	1.15	2509	du Pont	1294	3/5/01	1 "	1.25	10	1.15	du P.& Co.	93
O'brien & Sheehan, Plattsburg, N. Y.	3/25/99		1.25	15	1.10	400	Hazard	1193 1227							
Eureka Supply Co., Philadelphia, Pa.	12/13/99	2 "	1.15 (or 1.05)			8000	L. & R.	1373							
						411658									

Plaintiff's Exhibit 1300

CONTRACTS EXPIRING PERIOD ENDING DEC. 31, 1912

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

(Exhibit No. 1131, Gov. Ex. No. 18)

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.	Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
Turnback Hdwe. Co., J. H., Phillipsburg, Pa.	4/9/01	20 Mo.	1.25	10	1.15	3750	L. & R.								
Carlinville C. Co., Carlinville, Ills.	11/28/00	2 Yr.	1.25	10	1.15	3950	Equit.	1198							
Chapman Coal Co., Pittsburg, Kansas	12/17/01	1 "	1.35	15	1.20	2400	"								
Eaton, S. B., Du Quoin, Ills.	10/22/00	2 "	1.25	15	1.10	3800	Oriental	1264							
Eldon C. & M. Co., Ottumwa, Iowa	9/21/00	2 "	1.35	05	1.30	0	L. & R.	1259							
Empire C. & C. Co., Empire, Ala.	10/5/01	1 "	1.35	10	1.25	0	Birmingham	1302							
Federal Supply Co., Pittsburg, Pa.	7/17/00	2 "	1.25 (or 1.05	20	1.05 (or .80)	16898	Ohio								
Grady Trading Co., Indian Ty.	5/9/02	7 mo.	1.50	20	1.30	17000	du Pont	1246	5/9/00	2 Yr.	1.50	20	1.30	du P.& Co.	113
									4/16/02	7 mos.	1.50	20	1.30	"	112
									12/15/02	1 Yr.			1.30	"	111
									12/10/03	2 "	1.60	20	1.40	du Pont Co.	110
Green Hill C. Co., Sullivan, Ind.	9/11/01	1 yr.	1.25	15	1.10	)	Miami	1332							
Horns Colliery Co., Du Quoin, Ills.	10/13/99	3 "	1.25	10	1.15	1400	King	1208							
Hulle, C. E., Salem, Ills.	12/11/99	3 "	1.25	10	1.15	400	du Pont								
Kilpatrick Bros. & Collins, Beatrice, Nebr.	9/5/00	2 "	1.40	15	1.25	2000	American	1233							
LaFollette C. I. & Ry. Co., La Follette, Tenn.	12/24/01	1 "	1.35	15	1.20	2950	Hazard	1376							
McKinney, F. O., Prest., Zanesville, Ohio	10/11/00	2 "	1.25	15	1.10	2800	Miami	1157							

McGuffin, J. A., Sewell, W. Va.	9/1/00	2 "	1.25	15	1.10	5800	Hazard	1267								
Milner C. & Ry. Co., New Castle, Ala.	10/5/01	1 "	1.35	10	1.25	)	Birmingham									
Poston, C. L., Nelsonville, Ohio	9/26/00	2 "	1.25	15	1.10	3200	Ohio	1239								
Prairie Creek C. Co., Huntingdon, Ark.	9/1/00	2 "		10		5600	du Pont	1249	9/1/00	2 "	1.40	10	1.30	du P.& Co.	114
									9/24/02	3 "	1.40	10	1.30	"	115
Rock Run C. Co., Brazil, Ind.	12/9/99	3 "	1.25	15	1.10	1600	King	1227 1319								
Shawmut Com. Co., Shawmut, Pa.	10/10/01	1 Yr.	1.25	20	1.05	6336	du Pont	1362	10/1/00	1 Yr.	1.25	15	1.10	du P.& Co.	117
									10/10/01	1 "	1.25	20	1.05	"	116
Shelby Iron Co., Shelby, Ala.	12/31/01	1 "	1.35	10	1.25	0	Birmingham									
Virginia C. & I. Co., Stonega, Va.	11/21/01	1 "	1.30			11850	Chatt.									
Virginia I. C. & C. Co., Bristol, Tenn.-Va.	11/21/01	1 "	1.35			23500	"	1358								
Watson Bros., Bevier, Mo.	9/10/00	2 "	1.35	20	1.15	0	Austin									
Westville Coal Co., Westville, Ills.	11/21/99	3 "		15		4767	"	1228								
Chapman, M. D., Caperton, W. Va.	12/14/00	2 "	1.25 (or 1.10)	(or 1.10) 10	1.15	4000	Hazard	1270	12/14/00	2 "	1.25	10	1.15	Hazard	109
									2/13/03	1 "	1.35	15	1.20	"	108
Durham Coal Co., Chicamauga, Tenn.	9/1/00	2 "	1.35	15	1.20	6300	Chatt.	1245 1300								
Sebree Coal Co., Sebree, Ky.	3/9/01	1-9 Mo.	1.30	05	1.25	2400	L. & R.	1278								
G. W. Brown, P. Gass, Receiver, Pinckneyville, Ills.	12/28/00	2 Yr.	1.20			400	Miami									
						133101										

Plaintiff's Exhibit 1300

CONTRACTS EXPIRING QUARTER JUNE 30th, 1903:

(Exhibit No. 1132, Gov. Ex. No. 19)

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.
Archibold, John, Evansville, Ind.	6/23/00	3 Yr.	1.25	15	1.10	3350	du Pont	
Ark.-McAllister C. Co., Kansas City, Mo.	6/28/01	2 "		10		0	Austin	1323
Armstrong & Co., Clinton, Iowa	5/10/01	2 "	1.25	05	1.20	0	Oriental	1297
Baird, Geo. H., Bridgeville, Pa.	4/27/01	2 "	1.25	15	1.10	4000	"	1306
Baldwin Bros., Clinton, Iowa	6/13/01	2 "	(or 1.05) 1.25	05	1.20	400	L. & R.	1306
Barclay C. & M. Co., Barclay, Ills.	5/1/00	3 "	1.25	10	1.15	2500	du Pont	1247
Beiderbeck-Miller Co., Davenport, Iowa	4/22/01	2 "	1.25	05	1.20	800	Miami	1300
Bessemer Land & Imp. Co., Bessemer, Ala.	1/1/02	1 "	1.35	20	1.15	13600	Chatt.	1397
Big Fork C. & C. Co., Bluefield, W. Va.	4/18/01	2 "	1.30	05	1.25	400	King	1292
Blaney, W. H., Connellsville, O.	4/1/01	2 "	1.25	05	1.20	1200	Oriental	1297
Boggs, E. N., Boston, Ohio	6/17/01	2 "	1.25	10	1.15	400	Ohio	1325
Boomer C. & C. Co., Boomer, W. Va.	6/18/01	2 "	1.25	15	1.10	2400	Miami	1324
Boone, J. A., West Virginia	6/25/00	3 "	1.25	15	1.10	3500	Hazard	1246
Booth & Flynn, Pittsburg, Pa.	5/1/02	1 "	1.25	20	1.05	9333	du Pont	
Borders, W. R., Sparta, Ills.	4/19/01	2 "	1.25	05	1.20	0	Oriental	1297
Brown Mng. Co., Punxsutawney, Pa.	1/1/01	2 "	1.25	12½	1.12½	5450	"	1274
Cantrall Co-Operative C. Co., Cantrall, Ills.	5/1/00	3 "	(or 1.05) 1.25	10	1.15	3500	du Pont	1247
Capital Coal Co., Springfield, Ills.	5/1/00	3 "	1.25	10	1.15	6600	"	1247

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
6/23/00	3 Yrs.	1.25	15	1.10	du P.& Co.	118
6/23/03	3 "	1.35	15	1.20	"	119
5/1/00	3 Yrs.	1.25	10	1.15	du P.& Co	120
5/1/03	3 "	1.35	15	1.20	"	121
6/28/00	3 Yrs.	1.25	05	1.20	Hazard	123
				1.15 & 1.10		
6/24/03	3 "	1.35	15	120	"	122
5/1/02	1 "	1.25	20	1.05	du P.& Co.	124
5/1/00	3 "	1.25	10	1.15	"	126
5/1/03	3 "	1.35	15	1.20 & 1.17½		125
5/1/00	3 "	1.25	10	1.15	"	128
5/1/03	3 "	1.35	17½	1.17½	"	127
5/1/04	3 "			1.17½ & 1.15	"	1143
5/1/06	1 "	.95		.95	"	724
12/24/07	1 " A.R.	1.10		1.10	"	725/8

Plaintiff's Exhibit 1300

Carbon Limestone Co., Lowellville, Ohio	5/27/01	2 Yr.	1.25	10	1.15	1600	Ohio	1308							
Central Coal Co., Hickory, Iowa	6/12/01	2 "	1.35	05	1.30	4000	L. & R.		9/12/03	3 Yr.	1.35	15	1.20	L. & R.	129
Chambers B. S. & Co., Pittsburg, Kans.	3/30/01	2 "	1.35	10	1.25	1145	"								
Chapman C. Co., Jackson, Ohio	5/12/02	1 "	1.25	15	1.10	2800	Miami	1427							
Christian Co., C. C., Taylorville, Ills.	1/26/01	2 "	1.25	15 10	1.10 1.15	3200	"	1279							
Churchill D. B. & Co., Galesburg, Ills.	5/20/01	2 "	1.25	7½	1.17½	0	"	1315							
Citizens C. & M. Co., Lincoln, Ills.	5/1/00	3 "	1.25	10	1.15	3800	du Pont		5/1/00	3 Yr.	1.25	10	1.15	du P. & Co.	130
									5/1/03	3 "	1.35	15	1.20	"	131
Clear Lake Co-Oper. C. Co., Springfield, Ills.	5/1/00	3 "	1.25	10	1.15	4000	"	1250	5/1/00	3 "	1.25	10	1.15	"	103
									5/1/03	3 "	1.35	20	1.15	"	102
Cleveland Stone Co., Cleveland, Ohio	3/1/01	2 "	1.25	05	1.20	1000	Austin	1283							
Clover Leaf Mfg. Co., Coffin, Ills.	2/1/02	1 "	1.25	05	1.20	900	Equit.	1527							
Cochran & Pinkerton, McConnellsville, O.	4/1/01	2 "	1.25	05	1.20	0	Oriental	1297							
Collins C. Co., Brazil, Ind.		3 "	1.25	15	1.10	4300	Hazard		5/21/00	3 "	1.25	15	1.10	Hazard	132
Columbus & Hocking C. & I. Co., Columbus, Ohio	6/11/02	1 "	1.25	15	1.10	2400	Miami	1427							
Crabb, J. D., Litchfield, Ills.	5/1/01	2 "	1.25	05	1.20	3300	du Pont		5/1/01	2 "	1.25	05	1.20	du P. & Co.	133
									5/1/03	3 "	1.35	15	1.20	"	134
Crawford Mer. Co., Jasper, Ala.	5/20/00	3 "	1.35	10	1.25	1250	"		5/20/1	3 "	1.35	10	1.25	"	135
Crescent Coal Co., What Cheer, Iowa	5/25/01	2 "	1.35	10	1.25	800	L. & R.								
Crowder, W. H., Sullivan, Ind.	6/28/00	3 "	1.25	15	1.10	900	Hazard		6/28/00	3 "	1.25	15	1.10	Hazard	136
Cumberland C. & C. Co., Milestone, Tenn.	1/31/02	1 "	1.35	15	1.20	1200	Chatt.	1498 1348							
Davenport C. Co., Harrisburg, Ills.	5/2/00	3 "	1.25	10	1.15	6900	du Pont	1316 1241	5/2/00	3 "	1.25	10	1.15	du P. & Co.	140
									5/2/03	3 "	1.35	20	1.15	"	139

Plaintiff's Exhibit 1300

CONTRACTS EXPIRING QUARTER JUNE 30th, 1903:

(Exhibit No. 1132, Gov. Ex. No. 19)

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.	Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
ute, B. F., Coalport, Pa.	4/25/01	2 Yr.	1.25 (or 1.10)	10	1.15	400	Oriental	1297							
r, F. & Sons, Burlington, Ia.	4/13/01	2 "	1.25	05	1.20	0	"	1297							
t, J. F., Connellsville, Ala.	5/26/02	1 "	1.35	05	1.30	400	Chatt.	1434							
n Coal Co., Viola, Ills.	5/28/01	2 "	1.25	15	1.10	9000	L. & R.	1318	6/11/03	2 Yr.	1.35	20	1.15	L. & R.	137
re Coal Co., Viola, Ills.	5/28/01	2 "	1.25	15	1.10	11000	"	1318	6/11/03	2 "	1.35	20	1.15	"	138
ng, R. R., Hontzdale, Pa.	1/1/01	2 "	1.25	05	1.20	800	"	1295							
klin Iron Mfg. C., Franklin Springs, N. Y.	5/23/02	1 "	1.25	15	1.10	400	du Pont	1430	5/23/02 8/3/03	1 " 1 "	1.25 1.35	15 15	1.10 1.20	du P. & Co. "	142 141
h, Chestnut & Robbins, Jackson, Ohio	5/14/01	2 "	1.25	15	1.10	2400	Miami	1292							
r, Frank, Lincoln, Ills.	2/15/01	2 "	1.25	15	1.10	3000	L. & R.		2/15/03	2 "	1.35	17½	1.17½	L. & R.	985
gia I. & C. Co., Atlanta, Ga.	1/1/02	1 "		15		3500	Chatt.	1336							
rt Grocery Co., Portsmouth, Ohio	6/1/01	2 "	1.25	15	1.10	800	L. & R.	1312							
ath C. & I. Co., Pocohontas, Va.	6/19/02	1 "	1.35	15	1.20	0	Birm.	1625	6/19/02 8/5/03	1 " 1 "	1.25 1.45	 15	1.25 1.30	Birm. "	145 144
ne, W. A. & Sons, Toledo, Ohio.	3/14/01	2 "	1.25	15	1.10	800	Miami	1309							
t, P., Jr., Peoria, Ills.	4/1/02	1 "	1.25	05	1.20	1846	Phoenix	1603							
evine C. Co., Edgarton, W. Va.	6/18/00	3 "	1.25	10	1.15	1200	du Pont		8/1/03 6/18/00 5/1/00 5/1/03	3 " 3 " 3 " 3 "	 1.25 1.25 1.35	 10 & 5 05 17½	1.25 1.15 & 1.20 1.20 1.17½	D du P. & Co. " "	1143 146 147 148
nview C. M. Co., Greenview, Ills.	5/1/00	3 "	1.25	10	1.15	5000	"		4/2/06	1 "	1.00		1.00	du Pt. Co.	792
th & Nathaniel, Poulteney, Vt.	5/17/02	1 "	1.25	10	1.15	0	Schaght	1307							
er & Hafer, Star City, Ind.	5/23/00	3 "	1.25	15	1.10 (1132—3)	3000	Hazard		5/23/00 12/10/03	3 " 3 "	1.25 1.35	15 17½	1.10 1.17½	Hazard "	149 150

Plaintiff's Exhibit 1300

regor, R.,															
Bellaire, Ohio	4/20/01	2 Yr.	1.25	05	1.20	737	Miami	1300							
ning Supply Co.,															
Pennsylvania	1/23/01	2-3 mo.	1.25	20	1.05	14700	L. & R.	1367							
e Hill Coal Co.,															
Nelsonville, Ohio	5/22/01	2 Yr.	1.25	15	1.10	400	Ohio	1277							
net Company,															
Cincinnati, O.	4/29/01	2 "	1.25	15	1.10	400	Miami	1308							
net Smith C. & M. Co.,									6/28/00	3 "	1.25	05	1.20 "		154
Raymond City, W. Va.	6/30/00	3 "	1.25	15	1.10	3000	du Pont		6/30/97	3 Yr.	1.25	05	1.20 du P. Co.		155
igan C. & M. Co.,															
Bay City, Mich.	6/16/00	3 "	1.30	20	1.10	1200	Hazard	1241	6/16/00	3 "	1.30	10	1.20 Hazard		156
									6/23/03	3 "	1.40	10	1.30 "		157
									6/29/06	1 "	1.00		1.00 du P. Co.		851
									7/10/07	1 "	1.00		1.00 du P.P. Co.		853
									1/18/08 - 12/31/08		1.15		1.15 "		854-8
r Bros. & Co.,															
Mulberry, Kansas	6/1/01	2 "	1.35	15	1.20	2600	L. & R.	1449							
tor Coal Co.,															
Bay City, Mich.	6/16/00	3 "	1.30 (or 1.15)	10	1.20	0	Hazard	1241	6/16/00	2 Yr.	1.30	10	1.20 Hazard		158
ris Bros.,															
Du Quoin, Ills.	5/17/01	2 "	1.25	15	1.10	3600	Miami								
lock, W. A.,															
ronton, Ohio	4/9/01	2 "	1.25	15	1.10	0	King	1379	5/1/08	1 "	1.10		1.10 du P. Co.		873
nville Sewer Pipe Co.,								1277							
Nelsonville, Ohio	4/3/01	2 "	1.25	15	1.10	1600	Ohio	1371							
ns C. Co.,															
Fontanet, Ind.	6/16/00	3 "	1.25	15	1.10	0	du Pont		6/16/00	3 "	1.25	15	1.10 "		159
ood Carbon C. Co.,															
Nilwood, Ills.	5/1/08	3 "	1.25	15	1.10	1650	"		5/1/00	3 "	1.25	5	1.20 "		160
thern Coal Co.,															
Denver, Colo.	3/1/00	3 "	1.55	10	1.45	1600	"	1232	3/1/00	3 "	1.55	10	1.45 "		161
ton Bros.,															
Granville, N. Y.	5/13/02	1 "	1.25	10	1.15	0	Schaght								
Coal Co.,															
Odin, Ills.	6/24/01	2 "	1.25	15	1.10	1600	Miami								
e, Niele Thompson Company,															
Cambridge, Ohio	4/22/01	2 "	1.25	15	1.10	800	"	1384							
aloosa Powder Co.,															
Oscaloosa, Iowa	5/20/01	2 "	1.35	10	1.25 (1132—5)	1920	"								

Plaintiff's Exhibit 1300

CONTRACTS EXPIRING QUARTER JUNE 30th, 1903:

(Exhibit No. 1132, Gov. Ex. No. 19)

e and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.
ard & Co., Muchakinock, Ia.	5/27/01	2 Yr.		15		4000	L. & R.	
wood C. Co., lverwood, Ind.	5/23/00	3 "	1.25	15	1.10	0	Miami	
ons, A., dfield, Ohio	5/31/01	2 "	1.25	05	1.20	1200	Ohio	1286
Sheffield S. & I. Co., rmingham, Ala.	4/8/01	2 "	1.35	35	1.00	16345	du Pont	1320
s, C. W., eveland, Ohio	2/27/01	2 "	1.25	15	1.10	9500	Austin	1285
o-Pros. Mng. Co., rento, Ills.	3/20/01	2 "	1.25	10	1.15	1400	Equit.	1267
r, H. L., caloosa, Iowa	5/17/01	2 "	1.35	15	1.20	9598	L. & R.	
s C. Mfg. Co., pringfield, Ills.	5/1/00	3 "	1.25	10	1.15	6000	du Pont	1247
on C. M. Co., aunton, Ills.	5/1/02	1 "	1.25	15	1.10	2000	Phoenix	
uis & Big Muddy C. Co., rterville, Ills.	5/5/01	2 "	1.25	15	1.10	7800	L. & R.	
Mt. C. & C. Co., touts Mt., Ala.	5/23/02	1 "	1.35	10	1.25	0	Birming.	
side C. & C. Co., vansville, Ind.	6/20/00	3 "	1.25	15	1.10	3200	du Pont	
W. A., ittsburg, Kans.	5/15/01	2 "	1.35	10	1.25	0	L. & R. or Equit.	
W. H., udley, Pa.	4/17/01	2 "	1.25	10	1.15	1650	L. & R.	1296
mseh I. Co., ecumseh, Ala.	2/12/02	1 "	1.35	10	1.25	800	Chatt.	1336
v C. & M. Co., linton, Ind.	5/12/00	3 "	1.25	15	1.10	4400	L. & R.	
ewater C. Co., turgis, Ky.	3/18/01	2 "	1.30	10	1.20	400	du Pont	1293
ellwe C. C. & I. Co., rmingham, Ala.	5/29/02	1 "	1.35	10	1.25	0	Birming.	
kin. Ills. C. Co.,	1/4/02	1 "	1.25	10	1.15	1235	Phoenix	1397

(1132—7)

CONTRACT RENEWALS AS SHOWN CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
4/8/01	2 Yr.	1.00		1.00	du P. & Co.	170
4/4/05	2 "	1.10		1.10	L. & R.	1088
9/12/03	2 "	1.35	20	1.15	"	171
3/18/01	2 Yr.	1.25	05	1.20	du P. & Co.	172
3/13/03	3 "	1.35	15	1.20	"	173
4/5/01	1 "	1.25		1.25	Birmg.	174
4/5/03	1 "	1.30	02½	1.27½	"	175

Plaintiff's Exhibit 1300

& Boyd Hdwe. Mch., Rockville, Ind.	4/16/01	2 Yr.	1.25	15	1.10	1600	Miami	1300						
mwa Powder Co., Ottumwa, Iowa	4/16/01	2 "	1.35	10	1.25	2476	"							
ucah C. & M. Co., Paducah, Ky.	5/13/01	2 "	1.25	05	1.20	1600	Aus. & Du P.	1293						
ons & Scoville Co., Evansville, Ind.	4/16/01	2 "	1.25	10	1.15	1085	Miami	1300						
n. Traffic Co., Johnstown, Pa.	3/13/01	2 "	1.25 (or $1.05)	15	1.10	7200	Oriental	1291						
well C. M. Co., Pana, Ills.	5/17/01	2 "	1.25	15	1.10	800	Miami							
ips Fuel Co., Ottumwa, Iowa	5/16/01	2 "	1.35	10	1.25	9250	L. & R.	1309	5/1/03	2 Yr.	1.35	20	1.15 L. & R.	163
									3/15/05	1 "	1.12½		1.12½ "	162
									3/6/06	1 "	1.05		1.05 du Pont Co.	164
									12/27/07	1 "	1.15		1.15 " " Pdr. Co.	896/9
ips Mer. Co., Missouri	3/1/01	2 "		15		7600	Du Pont	1282	3/1/01	2 "	1.50	15	1.35 du Pt. & Co.	165
burg C. Co., Henderson, Ky.	6/5/01	2 "	1.25	10	1.15	2900	Oriental							
burg C. & C. Co., Pittsburg, Kan.	1/1/01	2 "	1.35	15	1.20	2979	L. & R.							
ck, J. F., Massillon, Ohio	2/27/01	2 "	1.25	10	1.15	3100	Austin	1285						
ers, S. F., Cleveland, O.	2/27/01	2 "	1.25	15	1.10	12450	"	1284						
ceton C. M. Co., Princeton, Ind.	5/24/00	3 "	1.25	15	1.10	4000	Du Pont		5/24/00	3 "	1.25	15	1.10 du Pt. & Co.	166
sia Hdwe. Co., Ft. Dodge, Iowa	6/12/01	2 "	1.35	05	1.30	3200	L. & R.	1296						
ecke C. Co., Madisonville, Ky.	3/1/02	1 "	1.30	20	1.10	400	Du Pont	1353	3/1/2	1 "	1.30	20	1.10 " "	167
									6/10/03	3 "	1.40	10	1.30 " "	168
ublic I. & S. Co., Springfield, Ills.	5/1/00	3 "	1.25	10	1.15	5800	"	1243	5/1/03	3 "			1.20	1143
eway Burton Co., Massillon, Ohio	2/27/01	2 "	1.25	10	1.15	5000	Austin	1283						
rton C. Co., Riverton, Ills.	3/12/00	3 "	1.25	15	1.10	16375	Du Pont		3/12/00	3 "	1.25	15	1.10 " "	169
erts, O. E., Jackson, Ohio	3/2/01	2 "	1.25	05	1.20	600	Miami							
xton Furnace Co., Saxton, Pa.	5/15/01	2 "	1.25	10	1.15	400	L. & R.							

Plaintiff's Exhibit 1300

CONTRACTS EXPIRING QUARTER JUNE 30th, 1903:

(Exhibit No. 1132, Gov. Ex. No. 19)

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to Ex's P. 3 Page No. in Lent	Date	Life	Net Price	Rebate	Price	Company	Exhibit No.
king Coal Co., Hocking, Iowa	5/17/01	2 Yr.	1.35	15	1.20	8300	L. & R.								
lden, C. Edw., Mineral City, O.	5/31/01	2 "	1.25	10	1.15	400	Ohio								
st, A. & Co., Maquokita, Iowa	4/16/01	2 "		10		0	Miami	1300							
Cent. C. & S. Co., St. Johns, Ills.	4/1/01	2 "	1.25	15	1.10	4000	L. & R.								
enwood Davis C. Co., Du Quoin, Ills.	2/6/01	2 "	1.25	15	1.10	2900	Oriental								
nd Valley C. & M. Co., Clinton, Ind.	6/21/00	3 "	1.25	15	1.10	7800	Hazard		6/21/00	3 Yr.	1.25	15	1.10	Hazard	151
per C. & C. Co., Colfax, Iowa	5/29/01	2 "	1.35	10	1.25	7000	L. & R								
ction Mng. Co., Springfield. Ills.	5/1/00	3 "	1.25	10	1.15	6650	du Pont	1247	5/1/06	1 "	.95		.95	du P. Co.	813
ler, Chas. F., Chicago, Ills.	5/22/00	3 "	1.25	15	1.10	1600	"		12/5/07	1 " A.R.	1.10		1.10	du P.Pdr.Co.	815-8
entz, F. P., Hollister, Ohio	5/16/01	2 "	1.25	15	1.10	1138	Miami	1324							
h C. Co., Mascoutah, Ills.	3/7/01	2 "	1.25	05	1.20	4675	Oriental	1283							
ler, John L., Columbus, Ohio	4/23/01	2 "	1.25	10	1.15	0	King								
ton C. & M. Co., Linton, Ind.	5/17/00	3 "	1.25	15	1.10	1700	Miami								
mis Mer. Co., Bevier, Mo.	5/1/03	2 "	1.35	10	1.25	1200	Phoenix								
ier, H. A., Evansville, Ind.	6/23/00	3 "	1.25	15	1.10	1200	du Pont		6/23/00	3 "	1.25	15	1.10	du P. & Co.	152
hrig Coal Co., Daleton, Ohio	6/19/00	3 "	1.25	15	1.10	2500	"	1243	8/4/03	3 "	1.35	15	1.20	"	153
maghi, Jos. D., St. Louis, Mo.	1/25/01	2 "	1.25	15	1.10	9500	Miami	1278							
Clain, Jesse O., Robertsdale, Pa.	4/7/01	2 "	1.25	10	1.15	1600	L. & R.	1304							
Connell & Luker, Kittanning, Pa.	3/16/01	2 "	1.25 (or 1.05)	10	1.15	400	"	1282 1318							
Gowan Bros., Steubenville, O.	4/16/01	2 "	1.25	15	1.10 (1132—4)	2800	Miami	1300							

Plaintiff's Exhibit 1300

Union Cement & Lime Co., Louisville, Ky.	1/27/01	2 Yr.-1 Mo.	1.25	15	1.10	38650	Miami	1279 1332 1332								
Upson Mng. Co., Shawnee, Ohio	4/30/01	2 "	1.25	15	1.10	1200	Austin	1299	2/3/05	1 Yr.	1.35	30	1.05	Explosive		1024
									1/1/04	1 "	1.35	22	1.13	"		1021
Utica Hyd. Cem. Co., Utica, Ills.	1/1/02	1 "	1.25	15	1.10	4800	L. & R.	1394	2/26/06 during Yr.	1906	.95		.95	du Pont Co.		947
Vernon C. & M. Co., Rich Hill, Mo.	11/13/01	2 "	1.35	10	1.25	2400	Phoenix		8/1/03	3 Yr.			1.20D			1143
Vicary Bros., Peoria, Ills.	4/1/02	1 "	1.25	05	1.20	2378	"	1286	11/27/07	1 Yr.			1.05D	du Pt. Pdr. Co.	N	
									11/27/08	1 "			1.10D	" "	DD	
Virden C. Co., Virden, Ills.	5/1/00	3 "	1.25	10	1.15	6785	du Pont									
Va. & Ala. C. Co., Patton, Ala.	5/14/00	3 "	1.35	20	1.15	0	"		5/14/00	3 Yr.	1.35	15	1.20	du Pont & Co.		176
Wabash Valley C. Co., Lyford, Ind.	5/12/00	3 "	1.25	15	1.10	2400	L. & R.									
Wallace C. Co., Redfield, Ohio	3/8/01	2 "	1.25	15	1.10	1600	Miami	1285 1346								
Warwick, J. W., Cleveland, Ohio	3/1/01	2 "	1.25	15	1.10	2800	Austin	1284								
Wear Coal Co., Kansas	8/1/01	2-1 Mo.	1.35	25	1.10	29064	L. & R.	1322	7/24/08	1 Yr.	1.15		1.15	du Pt. Pdr. Co.		1081-3
									3/1/07 to	3/31/08	.95		.95	" "		957
									3/1/04	3 Yr.	1.15		1.15	Clark		1053
									3/1/04		1.15		1.15	"		1054-67
Wells, W. A., Muchakinock, Ia.	5/17/01	2 Yr.	1.35	20	1.15	17200	"	1312	5/17/03	2 "	1.15		1.15	L. & R.		177
Wheeling & L. E. C. M. Co., Cleveland, Ohio	2/27/01	2 "	1.25	10	1.15	800	Austin	1284								
White, Walnut C. Co., Pinckneyville, Ills.	6/19/01	2 "	1.25	10	1.15	2581	L. & R.	1321	8/2/03	2 "	1.35	17½	1.17½	"		178
Zihlsdorf, D., Marissa, Ills.	3/14/01	2 "	1.25	10	1.15	3200	Oriental	1291	3/14/03	2 "	1.35	15	1.20	Oriental		1044
Burnside C. Co., Burnside, Pa.	1/1/01	2 "	1.25 (or 1.05)	10	1.15	7925	L. & R.	1295								
Victoria C. M. Co., Phillipsburg, Pa.	4/1/01	1-8 Mo.	1.25	05	1.20	400	du Pont		6/1/03	2 "	1.35	17½	1.17½	L. & R.		180
American Coal Co., Oskaloosa, Iowa	5/1/01	2 Yr.	1.35	15	1.20 (1132—8)	7000	L. & R.	1309	5/11/05	1 "	1.15		1.15	"		179
									5/10/06	1 "	1.05		1.05	du Pont Co.		675

Plaintiff's Exhibit 1300

CONTRACTS EXPIRING QUARTER JUNE 30th, 1903:

(Exhibit No. 1132, Gov. Ex. No. 19)

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company
...nton Supply Co., Indpls., Ind.	5/22/03	3 Yr.	1.10			1400	Miami
...weaqua C. & Mfg. Co., Moweaqua, Ills.	4/1/02	1 "	1.15			3400	Equit.
						539970	

CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Referred to in Lent Ex's P. 3 Page No.	Date	Life	Price	Rebate	Net Price	Company	Exhibit No.

Plaintiff's Exhibit 1300

CONTRACTS EXPIRING DECEMBER 31, 1903:

(Exhibit No. 1133, Gov. Ex. No. 20)

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. du PONT

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.	Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
s Cons. C. & I. Co., Birmingham, Ala.	10/1/00	3 Yr.	1.35	15	1.20	12800	Sycamore	1260	10/1/00	3 Yr.	1.35	15	1.20	Sycamore	181
									9/1/03	1 "	1.45	30	1.15	"	182
hland C. & I. Ry. Co., Ashland, Ky.	8/2/00	3 "	1.25	15	1.10	3200	Hazard								
wood Coal Co., What Cheer, Ia.	10/1/01	2 "	1.35	10	1.25	4000	L. & R.								
rrett-Hayden C. Co., Weir City, Kan.	9/3/01	2 "	1.35	10	1.25	0	"	1344							
ck-Walker C. Co., Belleville, Ills.	8/1/00	2 "	1.25	05	1.20	4400	Phoenix	1269							
ttino, D., & Bros., Coal City, Ills.	8/1/01	2 "	1.25	10	1.15	2150	American	1307							
xton & Landstreet, West Virginia	9/28/01	2 "		20		13000	Austin	1346							
rterville, C. Co., Carterville, Ills.	7/1/01	2 "	1.25	10	1.15	2600	Phoenix								
ntral C. & C. Co., Kansas	7/3/02	1 "		25		64048	L. & R.								
ntral C. & I. Co., Central City, Ky.	10/7/01	2 "	1.30	20	1.10	8150	du Pont	1353							
ic. & Carterville C. Co. Herron, Ills.	11/14/00	3 "	1.25	10	1.15	4854	"	1267	9/18/03	3 Yr.	1.35	17½	1.17½	du Pont Co.	184
lumbus Coal Co., Stippville, Kan.	12/11/01	2 "	1.35	10	1.25	2400	L. & R.	1394	9/1/04	3 "	1.25		1.25	L. & R.	185
met C. Co., Dayton, Ohio	12/18/01	2 "	1.25	10	1.15	1200	King	1396							
ngo C. M. Co., Columbus, Ohio	11/23/01	2 "	1.25	15	1.10	5000	Miami	1340							
rona C. & I. Co., Patton, Ala.	10/14/01	2 "	1.35	20	1.15	11750	Chatt.	1348							
rwin Tom Mng. Co., Wellston Ohio	8/8/01	2 "	1.25	15	1.10	800	King								
rwin Tom C. Co., Dayton, Ohio	9/21/01	2 "	1.25	15	1.10	800	Miami								
rooked Fork C. & C. Co., Patros, Tenn.	8-1-02	1 "	1.35	10	1.25	800	Chatt.								

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Plaintiff's Exhibit 1300

CONTRACTS EXPIRING DECEMBER 31, 1903:

(Exhibit No. 1133, Gov. Ex. No. 20)

ame and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.
iess Co. C. Co., Montgomery, Ind.	11/10/00	3 Yr.	1.25	10	1.15	6150	du Pont	
k Bros. C. & C. Co., Tilden, Ills.	10/5/01	2 "	1.25	20	1.05	17400	Miami	1346
n, Jas., Canton, Ills.	9/6/01	2 "	1.25	10	1.15	400	American	1345
o C. & C. Co., Beury, W. Va.	7/29/01	2 "	1.25	15	1.10	7000	King	
ma C. Co., Jackson, Ohio	8/2/00	3 "	1.25	15	1.10	2400	"	
eka Supply Co., Philadelphia, Pa.	12/16/01	2 "	1.25	20	1.05	6800	Austin	1373
ns, John Z., Avery, Ia.	10/2/01	2 "	1.35	15	1.20	0	Oriental	
nsville C. M. Co., Evansville, Ind.	8/23/00	3 "	1.25	15	1.10	800	du Pont	1290
elity L. & I. Co., Stone City, Kan.	8/2/01	2 "	1.35	10	1.25	5125	L. & R.	1331
hart C. & M. Co., Wellston, Ohio	10/4/01	2 "	1.25	15	1.10	11000	Miami	1223
ker, Geo. C., & Co., Colon, Ia.	10/21/01	2 "		15		800	L. & R.	
nklin Fuel Co., Columbus, Ohio	11/12/00	3 "	1.25	10	1.15	0	du Pont	1259
loway Coal Co., Memphis, Tenn.	12/18/01	2 "	1.35	10	1.25	7200	Chatt.	1477
dard, Wm., Tilden, Ills.	7/26/01	2 "	1.25	10	1.15	1750	Miami	1332
milton C. & Mer. Co., Weir City, Kan.	8/2/01	2-2 mo.	1.35	15	1.20	7340	L. & R.	1331
nna, D. R., Massillon, Ohio	7/1/01	2 Yr.	1.25	20	1.05	17524	Austin	
wald, F. Gen. Mgr., Sewell, W. Va.	8/31/00	3 "	1.25	15	1.10	9200	du Pont	
na Bitumen C. Co., Terre Haute, Ind.	10/1/00	3 "	1.25	15	1.10	2800	Hazard	
e. John. C. Co., Evansville, Ind.	8/23/00	3 "	1.25	10	1.15		du Pont	
C. & C. Co., Horse Creek, Ala.	9/29/00	3 "	1.35	10	1.25	10300	"	1260

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CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
11/10/97	3 Yr.	1.25	10	1.15	du Pont & Co.	187
9/20/00	3 "	1.25	10	1.15	"	186
12/20/03	3 "	1.35	20	1.15	du Pont Co.	188
11/18/05	1 Yr.	1.35	40	.95	King Mer.	1042
9/4/03	3 "	1.35	10	1.25	du Pont Co.	189
11/12/00	3 Yr.	1.25	10	1.15	du Pont & Co.	190
12/28/03	1 "	1.20		1.20	Chatt.	191
10/14/03	2 "	1.27½		1.27½	L. & R.	192
4/1/05	3 "	1.15		1.15	"	193
6/1/06	1 "	1.05		1.05	du Pont Co.	194
8/23/00	3 Yr.	1.25	15	1.10	du Pont & Co.	196

Plaintiff's Exhibit 1300

es, Edw., Jackson, Ohio	8/2/00	3 Yr.	1.25	15	1.10		King									
es Coal Co., Jackson, Ohio	7/20/01	2 "	1.25	15	1.10	5600		1324								
iata Limestone Co., Ltd., Carlin, Pa.	12/31/01	2 "	1.25	10			L. & R.	1377								
So. Coal Co., Fuller, Kas.	12/11/01	2 "	(Or $1.05) 1.35	10	1.25	2050	"	1389 1394								
y Is. L. & T. Co., Marblehead, Ohio	11/1/0	2 "	1.25	15	1.10	10802	Austin	1283								
Moor Iron Co., Virginia	8/15/00	3 "		15		1600	Hazard	1257	8/15/00	3 Yr.	1.25	10	1.15	Hazard		197
Do.	8/16/00	3 "		10		400	Oriental	1257								
kie Fuel Co., Scammon, Kas.	9/25/01	2 "	1.35	10	1.25	4325	L. & R.	1354								
r, J. Mason, Jr., Staunton, Va.	12/6/00	3 "		15		2000	Hazard		12/6/00	3 "	1.25	10	1.15	Hazard		198
r Creek C. Co., Coalfield, Ia.	10/1/01	2 "		10		2400	L. & R.	1354								
Carbon Co., Ltd., Powelton, W. Va.	7/5/02	1 "	1.25	15	1.10	1600	Hazard									
Carmel C. Co., Topeka, Kas.	8/1/01	2-1 Mo.	1.35	25	1.10	51700	L. & R.									
n Coal & Ice Co., Belleville, Ills.	8/14/00	3 "	1.25	10	1.15	3200	du Pont	1258	8/14/00	3 Yr.	1.25	10	1.15	du Pt. & Co.		200
									8/24/03	3 "	1.35	15	1.20	du Pont Co.		199
Ohio Washed C. Co., Illinois	7/1/00	3 "	1.25	10	1.15	8700	"									
allburg C. & C. Co., Nuttalburg, W. Va.	7/11/00	3 "	1.25	15	1.10	1200	"		7/10/97	3 "	1.25	05	1.20	du Pt. & Co.		202
									7/11/00	3 "	1.25	05	1.20	"		201
									3/1/08	1 "	1.15	..	1.15	du Pont Pdr. Co.		879–80
n Supply Co., Philadelphia, Pa.	12/16/01	2 "	1.25	20	1.05		Austin									
nnell C. Co., Grape Creek, Ills.	12/8/01	2 "	1.25	05	1.20		King	1260	7/29/00	3 Yr.	1.35	15	1.20	du Pont & Co.		203
t Rock O. & C. Co., Almy, Tenn.	9/29/00	3 "	1.35	15	1.20	2100	du Pont	1387								
s. & Mid. C. & M. Co., Missouri	9/1/01	2 "		15			L. & R.	1241								
ssell Creek C. & C. Co., Virginia City, Va.	9/20/00	3 "	1.30	10	1.20	400	King	1425								
pps Coal Co., Astoria, Ills.	7/16/01	2 "	1.25	05	1.20	1200	Equit.	1302								

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Plaintiff's Exhibit 1300

CONTRACTS EXPIRING DECEMBER 31, 1903:

(Exhibit No. 1133, Gov. Ex. No. 20)

me and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.
inee C. C. & L. Co., Tracy City, Tenn.	7/20/01	2 Yr.	1.35	10	1.25	2450	Chatt.	1308
Bros., Peoria, Ills.	7/1/02	1 "	1.25	10	1.15	2944	Phoenix du Pont	
h, N. M.—C. & M. Co., W. Mineral, Kas.	8/1/01	2 "	1.35	10	1.25	935	L. & R.	1330
West. C. & I. Co., Parsons, Kas.	10/12/01	2 "	1.35	25	1.10	21460	"	1322
well & Co., Spadia, Ark.	9/1/01	2 "	1.40	05	1.35	800	Phoenix	1301
ryside C. Co., Carterville, Ills.	10/25/00	3 "	1.25	10	1.15	4000	du Pont	1264
for, Jos., O'Fallon, Ills.	8/18/01	2 "	1.25	10	1.15	5250	Phoenix	
ston Coal Co., Wellston, Ohio	7/30/00	3 "	1.25	15	1.10	7400	King	
burton C. M. Co., Wilburton, I. T.	9/5/01	2 "	1.50	20	1.30	37200	Oriental	
druff Bros., Knoxville, Iowa	8/31/02	2 "	1.35	10	1.25	1600	American	1307
wn Mng. Co., Carrdif, Tenn.	10/3/00	3 "	1.35	20	1.15	6000	Sycamore	1260
			(or $1.25)					

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
11/27/08	1 Yr.			1.10	du P. Pdr. Co.	AA
11/27/07	1 "	1.05		1.05D	"	L 745-7
8/1/03	3 "	1.35	17½	1.17½D	du Pont & Co.	916
6/1/03	3 "	1.35	17½	1.17½	du Pont & Co.	205
7/28/04	2 "	1.35	20	1.15	Explosive S. Co.	1019
6/19/06	1 "	.95		.95	du Pont Co.	931
7/5/07	1 "A.R.	95		.95	du P. Pdr. Co.	932-3

445357

Plaintiff's Exhibit 1300

CONTRACTS EXPIRING PERIOD ENDING JUNE 30, 1904

(Exhibit No. 1134, Gov. Ex. No. 21)

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. J Page No.
na Coal Co., Glen Roy, Ohio	2/1/02	2 Yr.	1.25	15	1.10	4400	Miami	1404
pine Coal Co., Alpine, Ky.	2/13/01	3 "	1.35	15	1.20	0	Hazard	1277 1303
niston Hdwe. Co., Anniston, Ala.	5/16/01	3 "	1.35	15	1.20	1750	du Pont	1305
toria C. & M. Co., Astoria, Ills.	2/5/02	2 "	1.25	05	1.20	1402	Equit.	
burn & Alton C. Co., Alton, Ills.	5/1/01	3 "	1.25	05	1.20	1350	du Pont	1289
ley C. L. Gro. Co., Marietta, Ohio	3/29/01	3 "	1.25	10	1.15	400	Hazard	1290 1366
rd, L. M., Evansville, Ind.	3/18/01	3 "	1.25	10	1.15	5350	du Pont	1288
llinger C. & C. Co., Ballinger, W. Va.	4/4/01	3 "	1.25	15	1.10	1650	Hazard	1277
rrett Hdwe. Co., Jolliett, Ills.	3/15/01	3 "	1.25	10	1.15	900	du Pont	1352 1281
rack C. F. Bro. & Co., Louisville, Ky.	6/13/01	3 "	1.25	10	1.15	0	Hazard	1311
Stone Gap I. Co., Ewing, Va.	4/29/01	3 "	1.30	10	1.20	0	"	1278 1309
ck Creek C. Co., Navoo, Ala.	3/15/01	3 "	1.35	10	1.25	5800	Chatt.	1335
th & Glover, Hanby Sta., Ky.	8/24/01	3 "	1.30	10	1.20	400	du Pont	
ese C. & M. Co., Breese, Ills.	5/13/01	3 "	1.25	10	1.15	4800	"	
adhurst & Miller, W. Terre Haute, Ind.	3/1/01	3 "	1.25	05	1.20	0	"	
ooks, J. E., & Co., Des Moines, Ia.	4/16/02	2 "	1.35	15	1.20	11200	L. & R.	
nnelton C. Co., Cannelton, W. Va.	4/4/01	3 "	1.25	15	1.10	800	Chatt.	1289 1367
bondale C. & C. Co., Hanby Sta., Ky.	4/23/02	2 "	1.30	10	1.20	400	du Pont	
rver Bros., Morris Creek, W. Va.	4/20/01	3 "	1.25	15	1.10	3200	Hazard	1302
ntral Coal Co., Fire Creek, W. Va.	4/25/01	3 "	1.25	15	1.10	400	"	1309

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CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
2/13/01	3 Yr.	1.35	05	1.30	Hazard	206
5/16/01	3 "	1.35	15	1.20	du Pont & Co.	207
5/1/01	3 "	1.25	05	1.20	"	208
5/1/03	3 "	1.35	15	1.20	"	209
3/29/01	3 "	1.25	05	1.20	Hazard	210
3/18/01	3 "	1.25	10	1.15	du Pt. & Co.	211
4/4/01	3 "	1.25	05	1.20	Hazard	212
3/15/01	3 "	1.25	05	1.20	du Pont & Co.	213
		Special Price		1.25		1143
6/13/01	3 "	1.35	10	1.25	Hazard	214
4/29/01	3 "	1.30	10	1.20	"	215
4/15/04	3 "	1.27½		1.27½	Chatt.	216
5/13/99	2 "	1.25	10	1.15	du Pont Dn. Co.	218
5/8/01	3 "	1.25	10	1.15	"	217
3/1/01	3 "	1.25	05	1.20	"	219
4/23/02	2 Yr. 4 Mo.	1.30	10	1.20	du Pont & Co.	220
4/20/01	3 Yr.	1.25	15	1.10	Hazard	221
4/25/01	3 "	1.25	10	1.15	"	222

Plaintiff's Exhibit 1300

CONTRACTS EXPIRING PERIOD ENDING JUNE 30, 1904

(Exhibit No. 1134, Gov. Ex. No. 21)

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.	Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
Cherokee C. & M. Co., Cherokee, Kas.	2/15/02	2 Yr.	1.35	10	1.25	525	L. & R.	1402							
Chic. Virden Coal Co., Virden, Ills.	1/7/02	2 "	1.25	15	1.10	13966	"		3/1/04	1 Yr.			1.12½		1143
Coal Creek C. Co., Tazewell, Va.	3/15/01	3 "	1.30	10	1.20	840	Hazard	1311	5/15/01	3 "	1.30	10	1.20	Hazard	223
Coalfax C. & M. Co., Oskaloosa, Ia.	1/1/01	3 "	1.35	10	1.25	2600	du Pont	1273	1/1/01	3 "	1.35	10	1.25	du Pont & Co.	224
Consol. Coal Co., St. Louis, Mo.	5/15/02	2 "	1.25	20	1.05	26900	Hazard								
Crow, J. R. C. & M. Co., Scammon, Kas.	3/1/02	2 "	1.35	20	1.15	14140	L. & R.	1413	3/1/04	3 "	1.15 & 1.20	1.15 & 1.20		L. & R.	225
									5/10/01	3 "	1.30	05	1.25	Hazard	226
Curry, Tunis & Norwood, Lexington, Ky.	5/10/01	3 "	1.30 (or $1.20)	05	1.25	450	Hazard	1290	4/14/01	3 "	1.25	05	1.20	"	227
Dart's Sons, Henry, Rock Is., Ills.	4/4/01								No Contract				1.25		1143
Dixon, Sam.,		3 "	1.25	05	1.20	1600	"	1289							
Long Acre, W. Va.	4/15/01	3 "	1.25	15	1.10	2900	"	1302	4/18/01	3 Yr.	1.25	15	1.10	"	228
McDowell, W. Va.	4/15/01	3 "	1.30	15	1.15		"								
									4/1/01	3 "	1.25	05	1.20	"	229
Drake Hdwe. Co., Burlington, Ia.	4/1/01	3 "	1.25	05	1.20	0	"	1290	Special				1.35		1143
Durkee & Gross C. Co., Weir City, Kas.	5/1/02	2 "	1.35	10	1.25	2995	L. & R.								
Edwards Slate Co., Granville, N. Y.	5/1/01	3 "	1.25	10	1.15	0	Hazard	1307 1275							
Flemington C. & C. Co., Flemington, W. Va.	1/18/01	3 "	1.25	15	1.10	800	"	1366	1/18/01	3 Yr.	1.25	05	1.20	"	230
Fleming Coal Co., S. E. Kas.	5/1/02	2 "	1.35	20	1.15	175	L. & R.	1424							
Forest Fuel Co., Otley, Ia.	5/3/01	3 "	1.35	05	1.30	1350	du Pont	1289							
Forsythe C. Co., Cambridge, Ohio	3/27/01	3 "	1.25 (or $1.10)	10	1.15	900	Hazard	1278 1366 1280	3/27/01 5/1/01	3 " 3 "	1.25 1.25	05 05	1.20 1.20	" du Pont & Co.	231 232
Gardiner, J. B., Canton, Ills.	5/1/01	3 "	1.25	15	1.10	2100	du Pont	1363	4/28/04	Special			1.25		1143
Gartside Coal Co., Murphysboro, Ills.	4/1/02	2 "	1.25	05	1.20	2500	Phoenix	1273							
Gauley Mt. C. Co., Ansted, W. Va.	3/13/01	3 "	1.25	15	1.10	2000	Hazard	1277	3/13/01	3 Yr.	1.25	10	1.15	Hazard	233

Plaintiff's Exhibit 1300

Green River C. & M. Co., Spottsville, Ky.	2/26/01	3 "	1.30	10	1.20	1600	du Pont	1277 1363	2/26/01 5/23/04	3 " 3 "	1.25 1.35	05 15	1.20 1.20	du Pont & Co. du Pont Co.	234 235
Gunther F. T. Gro. Co., Owensboro, Ky.	4/24/01	3 Yr.	1.25	15	1.10	1900	du Pont	1288 1318	4/24/01	3 Yr.	1.25	15	1.10	du Pont & Co.	236
Halley & Wells, Etna Sta., Ohio	5/9/01	3 "	1.25	10	1.15	1550	Hazard	1278 1366	5/9/01	3 "	1.25	05	1.20	Hazard	237
Havens, C. B., & Co., Novinger, Mo.	1/24/01	3 "		10		4800	du Pont	1274	1/24/01	3 "	1.35	10	1.25	du Pont & Co .	238
Hayward & Murdock, Ironton, Ohio	3/15/02	2 "	1.25	15	1.10	400	Oriental	1368							
Heenan, D., & Co., Streator, Ills.	3/1/01	3 "	1.25	10	1.15	3200	du Pont	1293	3/1/01	3 "	1.25 Special	10	1.15 1.20	" "	239 1143
Hilmet Mng. Co., Lingo, Mo.	4/1/02	2 "	1.35	05	1.30	1200	Phoenix	1301							
Horse Creek C. Co., Pawnee, Ills.	5/1/01	3 "	1.25	10	1.15	5160	du Pont	1320	5/1/01	3 "	1.25	10	1.15	"	240
Hughes, Wm. H., Gransville, N. Y.	5/1/01	3 "	1.25	10	1.15	0	Hazard	1307	5/1/01	3 "	1.85	Salptre	1.85	Hazard	241
Jackson, F. M., Coleanor, Ala.	5/15/01	3 "	1.35	15	1.20	2800	Sycamore	1308	5/15/01 5/5/04	3 " 3 "	1.35 1.45	15 25	1.20 1.20	Sycamore "	242 243
Johnson, W. R., Crescent, W. Va.	4/4/01	3 "	1.25	15	1.10	450	Hazard	1278	4/1/01	3 "	1.25	10	1.15	Hazard	244
Krapp & Lees, Coal Valley, Ills.	4/4/01	3 "	1.25 (or $1.10)	05	1.20	1800	du Pont	1280 1363	5/1/03	3 "		1/25 &	1.20		1143
LaBelle C. & M. Co., Fontanac, Kas.	1/2/02	2 "		10		350	L. & R.	1394	1/3/04	3 "	1.30		1.30	L. & R.	245
Lebanon C. Co., Lebanon, Ills.	2/10/02	2 "	1.25	05	1.20	400	du Pont	1383	2/10/02	2 "	1.25	05	1.20	du Pont & Co.	246
Lincoln Park C. Co., Sangamon, Ills.	5/1/01	3 "	1.25	05	1.20	950	"	1294	5/1/01 9/1/03	3 " 3 "	1.25 1.35	05 10	1.20 1.15	" "	247 248
Little Edw., Hilliards Switch, Ills.	4/9/01	3 "	1.25	05	1.20	3150	"	1289	4/9/01 5/1/03	3 " 3 "	1.25 1.35	05 10	1.20 1.25	" "	249 250
Long & King, Bellaire, Ohio	2/13/01	3 "	1.25	10	1.15	0	Hazard	1278 1366	2/13/01	3 "	1.25	05	1.20	Hazard	251
McKitterick, J. J., & Co., O.	4/5/01	3 "	1.25	15	1.10	1600	King	1292							
McJohnson & Brannon, Owensburg, Ky.	10/18/01	3 "	1.25	15	1.10	400	Hazard		10/18/01	2 "7mo	1.25	15	1.10	"	252
McNally C. Co., Cannellsville, O.	2/20/01	3 "	1.25	10	1.15	400	"	1277 1366 191–10							
Maple Grove C. & M. Co., Des Moines, Ia.	4/24/02	2 "	1.35	05	1.30	1600	L. & R.	191–9	2/20/01	3 "	1.25	05	1.20	"	253

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Plaintiff's Exhibit 1300

CONTRACTS EXPIRING PERIOD ENDING JUNE 30, 1914

(Exhibit No. 1134, Gov. Ex. No. 21)

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.
Maple Wood C. Co., Farmington, Ills.	5/1/01	3 Yr.	1.25 (Or $1.10)	10	1.15	6840	du Pont	1363
Maxwell Bros. & Stewart, Monterey, Tenn.	3/10/02	2 "	1.35	15	1.20	0	Miami	1404
Mayer C. Co., West Mineral, Kas.	5/26/02	2 "	1.35	10	1.25	375	L. & R.	1344 1363
Meehan, P., Breeds, Ills.	4/11/01	3 "	1.25	15	1.10	800	du Pont	1289
Menden, Chas. H., Evansville, Ind.	9/9/01	3 "	1.25	15	1.10	1200	du Font	1340 1289
Monarch Coal Co., Farmington, Ills.	5/1/01	3 "	1.25	15	1.10	800	"	1363
Napier Iron Wks., Napier, Tenn.	1/1/01	3 "	1.35	05	1.30	1600	Sycamore	1270
New Pittsburg C. Co., Ohio & Penn.	6/15/02	2 "	1.25	15	1.10	6800	King	
Pine Knot C. Co., Strunks, Ky.	2/19/02	2 "		10		800	Chatt.	
Pinckney Mng. Co., Pinckney, Tenn.	3/26/02	2 "	1.35	10	1.25	0	Miami	1416
Pittenger & Davis, Centralia, Ills.	3/27/01	3 "	1.25	15	1.10	15000	du Pont	

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
5/1/01	3 Yr.	1.25	10	1.15	du Pont & Co.	254
5/1/03	3 "	1.35	17½	1.17½	"	255
10/15/07	1 "	1.05		1.05	du Pont Pdr. Co.	885-6
5/26/04	3 "	1.25		1.25	L. & R.	256
4/11/01	3 "	1.25	05	1.20	du Pont & Co.	257
5/1/03	3 "	1.25	05	1.20	"	258
5/1/03	3 "	1.35	10	1.25	"	259
8/20/06	3 "	1.00		1.00	du Pont Co.	872
1/1/01	3 "	1.35	05	1.30	Sycamore	260
1/1/04	3 "	1.45	10	1.35	"	261
4/29/04	2 "	1.25		1.25	Chatt.	262
3/27/99	2 "	1.25	15	1.10	du Pont & Co.	264
3/13/01	3 "	1.25	15	1.10	"	263

Plaintiff's Exhibit 1300

Pugh, W. A., Pres., Pittsburg, Ky.	1/18/01	3 "	1.30	10	1.20	3000	Hazard	1276	1/18/01	3 "	1.35	10	1.25	Hazard	265
Purcell M. & Co., Streator, Ills.	4/24/01	3 "	1.25	15	1.10	900	du Pont	1280	4/24/01	3 "	1.25	05	1.20	du Pont & Co.	266
Quinnimont Coal Co., Quinnimont, W. Va.	4/16/01	3 "	1.25	15	1.10	1200	Hazard	1295	4/16/01	3 "	1.25	10	1.15	Hazard	267
Randall, R. M., Saginaw, Mich.	4/6/01	3 "	1.30	20	1.10	19300	"	1303							
Ratican, Wm., Furmans, Ills.	4/30/01	3 "	1.25	05	1.20	1075	Oriental	1296							
Rennts & Co., Kramm Sta., Ills.	4/10/01	3 "	1.25	05	1.20	1600	du Pont	1289	4/10/01	3 "	1.25	05	1.20	du Pont & Co.	268
									8/1/03	3 "	1.35	10	1.25	Hazard	1003
									8/1/04	3 "	1.35	10	1.25	(D) du Pont Co.	900
									8/1/06	1 "	1.00		1.00	D "	901
Richardson-Neudorfer & Silcox, Portsmouth, Ohio	6/20/01	3 "	1.25	10	1.15	1250	Hazard	1311 1366	6/20/01	3 "	1.25	05	1.20	Hazard	269
Rombauer C. Co., Novinger, Mo.	1/24/01	3 "	1.35	10	1.25	4800	du Pont	1274	1/24/01	3 "	1.35	10	1.25	du Pont & Co.	270
									2/9/04	3 "	1.45	17½	1.27½	"	271
									2/9/07 to 4/1/08		1.00		1.00	" Pdr. Co.	906
									7/9/08	1 Yr.†	1.15		1.15	" "	907–11
Ronie Furnace Co., Lyerly, Ga.	4/25/01	3 "	1.35	05	1.30 (1134—4)	800	Hazard	1282	4/25/01	3 "	1.35 † A. R.	05	1.30	Hazard	272
Rothwell C. Co., Dubree, W. Va.	4/17/01	3 Yr.	1.25	15	1.10	800	Hazard	1295	4/17/01	3 Yr.	1.25	10	1.15	Hazard	273
Rush Run C. & M. Co., Rich Hill, Mo.	4/2/01	3 "	1.35	05	1.30	1600	du Pont	1288	4/2/01	3 "	1.35	05	1.30	du Pont & Co.	274
Shaffer, Lloyd L., Kangley, Ills.	3/23/01	3 "	1.25	15	1.10	400	"	1364							
Skellett C. Co.,															

Plaintiff's Exhibit 1300

CONTRACTS EXPIRING PERIOD ENDING JUNE 30, 1904

(Exhibit No. 1134, Gov. Ex. No. 21)

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.
Spencer & Hazelton,		2 "	1.25	05	1.20	1600	Phoenix	1372
New Straitsville, Ohio	3/1/01							
Belleville, Ills.	4/1/02	3 "	1.25	10	1.15	4000	Ohio	1279
Do.	3/13/01	3 "	1.25	10	1.15	1000	Hazard	1279
Tallula C. Co.,								
Tallula, Ills.	5/1/01	3 "	1.25	10	1.15	1250	du Pont	1327
Tavern Rock Sand Co.,								
Klondike, Mo.	4/17/02	2 "	1.35	05	1.30	400	Equit.	1301
Tenn. C. I. & Ry. Co.,			1.35	35	1.00	54900	Chatt.	1325
Tennessee & Alabama	4/26/01	3 "	(or $1.10)					99 9-10c
Thompson Bros. & Meadows,								
Ensley, Ala.	5/6/01	3 "	1.35	05	1.30	0	du Pont	1295
Trutter C. Co.,								1327
Pleasant Plains, Ills.	5/1/01	3 "	1.25	10	1.15	531	"	1339
Velde Roelfs Co.,								1290
Pekin, Ills.	4/9/01	3 "	1.25	10	1.15	0	Hazard	1392
Victoria C. & C. Co.,								
Sewell, W. Va.	4/19/01	3 "	1.25	10	1.15	1898	du Pont	
Vincent, H. S.,								
Ft. Dodge, Ia.	4/1/01	3 "	1.35	05	1.30	1650	Hazard	1290

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
3/13/01	3 "	1.25	10	1.15	Hazard	275
5/1/01	3 "	1.25	10	1.15	du Pont & Co.	276
9/1/03	3 "	1.35	15	1.20	"	277
4/19/04	3 "	1.05		1.05	Chatt.	278
5/6/01	3 "	1.35	05	1.30	du Pont & Co.	279
5/1/01	3 "	1.25	10	1.15	"	281
9/1/03	3 "	1.35	10	1.25	du Pont Co.	280
4/9/01	3 "		05		Hazard	282
4/19/01	3 "	1.25	10	1.15	du Pont & Co.	283
4/1/01	3 "	1.25	05	1.20	Hazard	284
Special				1.35		1143

Plaintiff's Exhibit 1300

Va. & Pitts. C. & C. Co., West Virginia	2/16/01	3 "		15 (or $1.10)		1250	"	1277	2/16/01	3 "	1.25	05	1.20	"	285
Weir Jct. C. Co., Weir City, Kas.	1/25/02	2 "	1.35	10	1.25	875	L. & R.	1402	1/25/04	3 "	1.25		1.25	L. & R.	286
Wilhoyte-Barrett & Co., Owensboro, Ky.	5/24/01	3 "	1.25	15	1.10	0	Hazard	1290 1318	5/14/01	3 "	1.35	10	1.25	Hazard	287
Williams, R. A., Flat Rock, Ky.	5/14/01	3 "	1.35	10	1.25	1550	"	1307	5/24/01	3 "	1.25	10	1.15	"	289
Willis C. & M. Co., Willisville, Ills.	4/1/02	2 "	1.25	15	1.10	11690	Phoenix	1372	7/14/04	2 "	1.35	20	1.15	Explosive	1033
						308187									
						(1134-5)									
Wilson, R. L., Coal Valley, Ills.	4/4/01	3 Yr.	1.25	15	1.10	400	du Pont	1288 1364	Special 4/9/01	3 Yr.		05	1.25	Hazard	1143 288
Winters, S. P., Bartonville, Ills.	4/9/01	3 "	1.25	10	1.15	1300	Hazard	1290 1392	8/1/03	3 "	1.35	10	1.25	duPont D.N.Co.	972
									6/8/06	1 "	1.00		1.00	du Pont Co.	973
New Soddy C. Co., Chattanooga, Tenn.	1/1/02	2 "	1.35	20	1.15	12837	Chatt.	1325	8/1/03	3 "	1.35	10	1.25	Hazard	1004
Norris Supply Co., Norris, Ills.	5/1/01	3 "	1.25	15	1.10	2800	du Pont	1299 1363	5/1/01	3 "	1.25	05	1.20	du Pont & Co.	290
						325524			5/1/03	3 "	1.35	10	1.25 & 1.20	" "	291
						(1134-6)									

Plaintiff's Exhibit 1300

CONTRACTS EXPIRING PERIOD ENDING DEC. 31, 1904:

(Exhibit No. 1135, Gov. Ex. No. 22)

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.
Atoka C. & M. Co., Lehigh, I. T.	7/7/02	2 Yr.	1.50	20	1.30	5000	du Pont	1298
Bicknell C. Co., Bicknell, Ind.	9/27/01	3 "	1.25	15	1.10	2100	Hazard	1649
Buckeye C. & Ry. Co., Columbus, Ohio	7/11/02	2 "	1.25	15	1.10	4400	Miami	
Chatham Co. Co., Chatham, Ills.	9/15/01	3 "	1.25	15	1.10	1900	du Pont	1375
Collins Colliery Co., Collinsville, W. Va.	7/16/02	2 "	1.25	15	1.10	3000	Hazard	
Continental C. Co., Columbus, Ohio	7/17/02	2 "	1.25	20	1.05	3200	Miami	1416
Deer Creek Co., Corona, Ala.	8/1/01	3 "	1.35	10	1.25	2400	Chatt.	1337
Donley C. Co., Bussey, Iowa	8/1/01	3 "	1.35	15	1.20	2550	du Pont	1327
Foley, Wm. E., Mapleton, Ills.	8/17/01	3 "	1.25	10	1.15	800	Hazard	1392
Gray, Thos. R., Springfield, Ills.	11/15/01	3 "	1.25	05	1.20	840	du Pont	1375
Howarth & Taylor Bros., Edwards, Ills.	11/12/01	3 "	1.25	05	1.20	1600	"	1289
Ills. & Ia. Fuel Co., Ottumwa, Ia.	8/1/01	3 "	1.35	10	1.25	3000	"	1340
Independent C. Co., Carterville, Ills.	7/9/01	3 "	1.25	10	1.15	2000	"	1363
Kan. City Midland C. & M. Co., Novinger, Mo.	11/21/01	3 "	1.35	10	1.25	3200	Phoenix	1309
Latham C. Co., Springfield, Ills.	12/1/01	3 "	1.25	10	1.15	800	du Pont	1391
Missouri Ark. & C. Co., Red Rock, Ark.	8/6/01	3 "		10		800	Equit.	1316
Nevins C. Co., Pittsburg, Kas.	7/17/02	2 "	1.35	15	1.20	0	L. & R.	1449
Olmsted, Harry, Columbus, Ohio	7/11/02	2 "	1.25	20	1.05	32000	Miami	1437
						69590		

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
9/27/01	3 Yr.	1.25	05	1.20	Hazard	292
9/15/01	3 "	1.25	15	1.10	du Pont & Co.	300
7/16/97	2 "	1.25	15	1.10	Hazard	295
7/19/00	2 "	1.25	15	1.10	"	294
6/16/02	2 "	1.25	15	1.10	"	293
8/1/01	3 "	1.25	05	1.20	Hazard	296
8/1/03	3 "	1.35	10	1.25	du Pont DN Co.	780
11/30/07	1 "	1.05		1.05(D)	duP. Pdr. Co.	759-61 & V
11/12/01	3 "	1.25	05	1.20	du Pont & Co.	297
11/25/07	1 "	1.05		1.05(D)	duP. Pdr. Co.	741-4 & G
11/1/04	3 "	1.35	17½	1.17½	du P. DN Co.	794 to 800
8/1/01	3 "	1.35 & 1.25	10	1.25 & 1.15	du P. & Co.	298
5/1/03	3 "	1.45	15	1.30	"	299
7/9/01	3 "	1.25	05	1.20	"	301
12/1/01	3 "	1.25	10	1.15	"	302

Plaintiff's Exhibit 1300

Proctor C. Co., Red Ash, Ky.	7/11/01	3 Yr.	1.35	18	1.17	69590 1600	du Pont	1318 1436	7/11/01	3 Yr.	1.35	18	1.17	du Pont & Co.	303
Rich Hill C. M. Co., Rich Hill, Mo.	7/7/02	2 "	1.35	20	1.15	37600	"	1338							
"	"	2 "	"	"	"	44353	Equit.	1338							
Rolando, M., Braidwood, Ills.	7/10/01	3 "	1.25 (or $1.15)	05	1.20	1200	Austin								
South Mtn. C. Co., Petersburg, Ills.	7/1/01	3 "	1.25	10	1.15	1700	du Pont	1340	7/1/01	3 "	1.25	10	1.15	Do	304
Spaid, I. P., Hartford, Ohio	7/1/01	3 "	1.25	10	1.15	400	Hazard	1366	9/1/03	3 "	1.35	10	1.25	du Pont Co.	305
Taylorville C. Co., Taylorville, Ills.	7/31/02	2 "	1.25	15	1.10	5200	Miami	1451	7/1/01	3 "	1.25	05	1.20	Hazard	306
Trolls C. & Sons, St. Clairsville, Ohio	7/2/01	3 "	1.25 (or $1.10)	05	1.20	800	Hazard	1290	7/2/01	3 "	1.25	05	1.20	"	307
Victor Fuel Co., Denver, Colo.	7/1/01	3 "	1.55	25	1.30	9600	du Pont		7/1/01	3 "	1.25	25	1.00	du Pont & Co.	308
W. Va. Fire Clay Wks., New Cumberland, W. Va.	8/23/01	3 "	1.25 (or $1.15)	10	1.15	1200	Hazard	1342	7/1/03	3 "			1.00		1143
						173243			8/23/01	3 "	1.25	10	1.15	Hazard	309

Plaintiff's Exhibit 1300

CONTRACTS EXPIRING PERIOD ENDING JUNE 30, 1905:

(Exhibit No. 1136, Gov. Ex. No. 23)

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.
Arlington C. & C. Co., McDowell, W. Va.	6/14/02	3 Yr.	1.30	20	1.10	2000	du Pont	
Athens Mng. Co., Athens, Ills.	5/1/02	3 "	1.25	10	1.15	2800	"	1562
Bon Air C. L. & L. Co., Nashville, Tenn.	6/18/01	4 "	1.35	15	1.20	9000	Chatt.	1337
Buffalo Iron Co., Nashville, Tenn.	6/18/01	4 "	1.35	15	1.20	2000	"	1337
Citizens C. M. Co., Springfield, Ills.	5/1/02	3 "	1.25	10	1.15	7100	du Pont	1562
Clark C. & C. Co., Peoria, Ills.	6/1/02	3 "	1.25	10	1.15	0	Phoenix	1460
Collier Co-Operative C. Co., Peoria, Ills.	6/1/02	3 "	1.25	10	1.15	5750	du Pont	1562
Colo. F. & I. Co., Denver, Colo.	6/1/02	3 "	1.55	25	1.30	40700	"	
Decatur Coal Co., Niantic, Ills.	5/1/02	3 "	1.25	15	1.10	1600	"	1363
Des Moines C. Mg. Co., Des Moines, Iowa	5/1/02	3 "	1.35	10	1.25	10000	"	1489
Jones & Adams Co., Illinois	5/1/02	3 "	1.25	10	1.15	8750	"	1562
Newsam Bros., Peoria, Ills.	6/1/02	3 "	1.25	10	1.15	20000	"	1563

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
7/14/02	3 Yr.	1.30	20	1.10	du Pont & Co.	4
7/14/05	3 "	1.40	30	1.10	du Pont Co.	4a
5/1/03	3 "			1.20		1143
6/18/01	4 "	1.20		1.20	Chatt.	5
5/1/02	3 "	1.25	10	1.15	du Pont & Co.	6
5/1/03	3 "	1.35	17½	1.17½	"	6a
5/1/06	1 "	.95		.95	du Pont Co.	6b
11/15/07	1 "	1.05		1.05	du Pont Pdr. Co.	6c
6/1/02	3 "	1.15		1.15	Phoenix	1045
8/1/03	3 "	1.35	15	1.20D	du Pont Co.	730
8/1/06	1 "	1.00		1.00	"	732
11/11/07	1 "	1.05		1.05D	du P. Pdr. Co.	740
6/1/02	3 "	1.25	10	1.15	du Pont & Co.	7
5/1/03	3 "	1.35	15	1.20	du P. DN & Co.	8
5/1/06	1 "	1.00		1.00	du Pont Co.	735
11/11/07	1 "	1.05		1.05D	duP. Pdr. Co.	736-9&C
6/1/02	3 "	1.25	25	1.00	du Pont & Co.	9
5/1/02	3 "	1.25	05	1.20	"	10
5/1/02	3 "	1.25	10	1.15	"	11
5/1/03	3 "			1.25		1143
5/1/02	3 "	1.25	15	1.10	"	12
5/1/03	3 "	1.35	20	1.15	du P. DN & Co.	13
6/1/02	3 "	1.25	10	1.15	"	14
5/1/03	3 "	1.35	20	1.15	du Pont & Co.	15

Plaintiff's Exhibit 1300

Norton C. Co., Norton, Va.	1/31/02	3 "	1.30	10	1.20	400	Hazard	1402	11/9/07	1 "	A.R.1.05		1.05	du P. Pdr. Co.	876-8
O. K. C. Co., Bussey, Iowa	4/1/02	3 "	1.35	15	1.20	2400	du Pont	1368 1564	1/31/02	3 "	1.30	10	1.20	Hazard	16
Riverdale Mg. Co., Fairmont, W. Va.	1/24/02	3 "	1.25	16	1.10	0	"	1391	1/24/02	3 "	1.25	15	1.10	du Pont & Co.	17
Sangamon C. Co., Springfield, Ills.	5/1/02	3 "	1.25	10	1.15	6200	"	1563	5/1/02	3 "	1.25	10	1.15	"	18
Springfield Co-Oper. C. Co., Springfield, Ills.	5/1/02	3 "	1.25	10	1.15	4300	"	1564	12/31/07	1 "	A.R. 1.10		1.10	du P. Pdr. Co.	913-15
Wabash C. Co., Athens, Ills.	5/1/02	3 "	1.25	10	1.15	9800	"	1563	5/1/02	3 "	1.25	10	1.15	du Pont & Co.	19
									5/1/03	3 "	1.35	17½	1.17½	"	20
									5/1/02	3 "	1.25	15	1.10	"	21
									5/1/03	3 "	1.35	20	1.15	"	22
									6/29/06	1 "	.95		.95	du Pont Co.	23
									12/28/07	1 "	1.10		1.10	du P. Pdr. Co.	24
			(1136—1)												
Walton Bros., Fairbury, Ills.	5/1/02	3 Yr.	1.25	15	1.10	1600	du Pont	1564	5/1/03	3 Yr.	1.35	10	1.25	du Pont & Co.	26
									5/1/02	3 "	1.25	5	1.20	"	25
Wapello C. Co., Hiteman, Iowa	6/1/02	3 "	1.35	10	1.25	10800	"	1563	6/1/02	3 "	1.35	10	1.25	"	27
									5/1/03	3 "	1.35	20	1.15	"	28
									4/21/06	1 "	1.05		1.05	du Pont Co.	29
									11/26/07	1 "	1.10		1.10	du P. Pdr. Co.	30
Whitebreast Fuel Co., Ottumwa, Iowa	6/1/02	3 "	1.35	20	1.15	36600	"		6/1/02	3 "	1.25	25	1.00	du Pont & Co.	31
Woodside C. Co., Springfield, Ills.	5/1/02	3 "	1.25	10	1.15	4000	"		5/1/02	3 "	1.25	10	1.15	du Pt. & Co.	32
									5/1/03	3 "	1.35	20	1.15	"	33
									5/1/06	1 "	.95		.95	du Pont Co.	34
									1/2/08	1 "	A.R. 1.10		1.10	du P. Pdr. Co.	37
						185800									

(1136-2)

Plaintiff's Exhibit 1300

CONTRACTS EXPIRING PERIOD ENDING DEC. 31, 1905.

(Exhibit No. 1137, Gov. Ex. No. 24)

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.	Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
Angle Colliery Co., Maybeury, W. Va.	7/14/02	3 Yr.	1.30	20	1.10		King								
Algoma Coal Co., Algoma, W. Va.	7/14/02	3 "	1.30	20	1.10	2800	Hazard	1080							
Ashland C. & C. Co., Ashland, W. Va.	7/14/02	3 "	1.30	20	1.10	4000	"	1080	7/14/02	3 Yr.	1.30	20	1.10	Hazard	38
Booth Bowen C. & C. Co., Simmons, W. Va.	7/14/02	3 "	1.30	20	1.10	2800	King	1080	7/14/05	3 "	1.40	30	1.10	King	39
Bottom Creek C. & C. Co., Vivian, W. Va.	7/14/02	3 "	1.30	20	1.10	1200	du Pont	1081	7/14/02	3 "	1.30	20	1.10	du PontDN&Co.	40
									9/12/08	1 "			1.12½	du Pont Pdr. Co.	43
									9/23/09	1 "			1.17½	" "	44
Buckeye C. & C. Co., West Virginia	7/14/02	3 "	1.30	20	1.10	2000	King	1081	7/14/05	3 "	1.40	30	1.10	du Pont Co.	41
									7/14/05	3 "	1.40	30	1.10	King	45
Caswell Creek C. & C. Co., Simmons, W. Va.	7/14/02	3 "	1.30	20	1.10	2800	"	1081							
Cromer C. & C. Co., Elkhorn, W. Va.	7/14/02	3 "	1.30	20	1.10	4000	Hazard	1080	7/14/02	3 "	1.30	20	1.10	Hazard	46
Crystal C. & C. Co., Godfrey, W. Va.	7/14/02	3 "	1.30	20	1.10	0	"		"	3 "	"	"	"	"	47
Delta Colliery Co., Maybeury, W. Va.	7/14/02	3 "	1.30	20	1.10	0	King								
Elkhorn C. & C. Co., Maybeury, W. Va.	7/14/02	3 "	1.30	20	1.10	2800	Hazard	1080	7/14/02	3 "	1.30	20	1.10	Hazard	48

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Elk Ridge C. & C. Co., Kyle, W. Va.	7/14/02	3 "	1.30	20	1.10	1600	"	1080	"	3 "	1.30	20	1.10	"	49
Eureka C. & C. Co., Eckman, W. Va.	7/14/02	3 "	1.30	20	1.10	1200	King	1080	7/14/05	3 "	1.40	30	1.10	King	50
Gilliam C. & C. Co., Gilliam, W. Va.	7/14/02	3 "	1.30	20	1.10	1600	du Pont	1080	7/14/02	3 "	1.30	20	1.10	du PontDN&Co.	51
									7/14/05	3 "	1.40	30	1.10	du Pont Co.	52
Goodwill C. & C. Co., Goodwill, W. Va.	7/14/02	3 "	1.30	20	1.10	2400	Hazard	1080	7/14/02	3 "	1.30	20	1.10	Hazard	54
Greenbrier C. & C. Co., McDowell, W. Va.	7/14/02	3 "	1.30	20	1.10	1800	"	1080	7/14/02	3 "	1.30	20	1.10	"	55
Houston C. & C. Co., Elkhorn, W. Va.	7/14/02	3 "	1.30	20	1.10	5200	King	1080	7/14/05	3 "	1.40	30	1.10	King	56
Keystone C. & C. Co., Keystone, W. Va.	7/14/02	3 "	1.30	20	1.10	1600	du Pont Hazard King	1081	7/14/05	3 "	1.40	30	1.10	"	57
Lick Branch Colliery, Maybeury, W. Va.	7/14/02	3 "	1.30	20	1.10	1200	King	1081							
Louisville C. & C. Co., Goodwill, W. Va.	7/14/02	3 "	1.30	20	1.10	3600	Hazard	1080	7/14/02	3 "	1.30	20	1.10	Hazard	58
Lynchburg C. & C. Co. Kyle, W. Va.	7/14/02	3 "	1.30	20	1.10 (1137-1)	2200	"	1080	7/14/02	3 "	1.30	20	1.10	"	59
Manufacturers C. & C. Co., Kansas City, Mo.	1/16/02	3 Yr.	1.35	10	1.25	800	du Pont	1391	1/16/02	3 Yr.	1.35	10	1.25	du PontDN&Co.	61
									5/1/03	3 "	1.45	17½	1.27½	"	62
									4/11/06	1 "			1.05	du Pont Co.	64

Plaintiff's Exhibit 1300

CONTRACTS EXPIRING PERIOD ENDING DEC. 31, 1905.

(Exhibit No. 1137, Gov. Ex. No. 24)

CONTRACT RENEWALS AS SHOWN BY CONTRACTS PRODUCED BY KERR, RICE & A. I. DU PONT

Name and Address	Date	Life	Price	Rebate	Net	Kegs	Company	Referred to in Lent Ex's P. 3 Page No.	Date	Life	Price	Rebate	Net Price	Company	Exhibit No.
Mill Creek C. & C. Co., Coopers, W. Va.	7/14/02	3 "	1.30	20	1.10	1200	King	1080							
Morris C. & C. Co., Huntsville, Mo.	7/28/02	3 "	1.35	15	1.20	3200	du Pont	1448							
Norfolk C. & C. Co., Maybeury, W. Va.	7/14/02	3 "	1.30	20	1.10	4800	King	1081							
Peerless C. & C. Co., Vivian, W. Va.	7/14/02	3 "	1.30	20	1.10	2400	Hazard	1081	7/14/02	3 "	1.30	20	1.10	Hazard	65
Pocahontas Company, McDowell, W. Va.	7/14/02	3 "	1.30	20	1.10	0	du Pont Hazard	1080	7/14/02	3 "	1.30	20	1.10	du PontDN&Co.	66
Mercer County							King		7/14/02	3 "	1.30	20	1.10	Hazard	67
Pocahontas Colliery, Pocahontas, W. Va.	7/14/02	3 "	1.30	20	1.10	6000	Hazard								
Powhattan C. & C. Co., Powhattan, W. Va.	7/14/02	3 "	1.30	20	1.10	1200	"	1081	7/14/02	3 "	1.30	20	1.10	Hazard	67
Pulaski Iron Co., Eckman, W. Va.	8/1/02	3 "	1.30	20	1.10	2000	L. & R.	1081							
Rainbow C. & M. Co., Caledonia, Ind.	9/1/02	3 "	1.25	20	1.05	3400	du Pont	1219	9/1/02	3 "	1.25	10	1.15	du Pont N. & Co.	68
									5/1/03	3 "	1.35	15	1.20	" "	69
Roanoke C. & C. Co., Worth, W. Va.	7/14/02	3 "	1.30	20	1.10	1600	King	1081	7/14/05	3 "	1.40	30	1.10	King	70
Rolfe C. & C. Co., Worth, W. Va.	7/14/02	3 "	1.30	20	1.10	900	"	1080							
Sagamore C. & C. Co., Bramwell, W. Va.	7/14/02	3 "	1.30	20	1.10	0	Hazard du Pont		7/14/02	3 "	1.30	20	1.10	Hazard	71

Plaintiff's Exhibit 1300

Shamokin C. & C. Co., West Virginia	7/14/02	3 "	1.30	20	1.10	6800	Hazard King	1081	7/14/02	3 "	1.30	20	1.10	du PontDN&Co.	72
Shawnee C. & C. Co., Eckman, W. Va.	7/14/02	3 "	1.30	20	1.10	2000	du Pont	1081	7/14/02	3 "	1.30	20	1.10	" "	73
Thacker C. & C. Co., Thacker, W. Va.	7/14/02	3 "	1.25	15	1.10	400	Hazard	1344	7/14/05	3 "	1.40	30	1.10	du Pont Co.	74
Thomas C. & C. Co., McComas, W. Va.	7/14/02	3 "	1.30	20	1.10	0	"								
Tidewater C. & C. Co., Tidewater, W. Va.	7/14/02	3 "	1.30	20	1.10	400	"	1081	7/14/02	3 "	1.30	20	1.10	Hazard	76
Turkey Gap C. & C. Co., Ennis, W. Va.	7/14/02	3 "	1.30	20	1.10	3800	King Hazard du Pont	1081							
			(1137-2)												
Upland C. & C. Co., Elkhorn, W. Va.	7/14/02	3 Yr.	1.30	20	1.10	2800	duPont Hazard King	1081							
McDowell C. & C. Co., McDowell, W. Va.	7/14/02	3 "	1.30	20	1.10	1600	King	1080							
						90100									
			1906												
Fairmont Coal Co., Fairmont, W. Va.	8/19/01	5 Yr.	1.25	25	1.00	48597	du Pont Austin	1362	8/19/01	5 Yr.	1.25	25	1.00	du PontDN&Co.	1
					(1137-3)										

8350 *Plaintiff's Exhibit 1301*

Plaintiff's Exhibit No. 1301.

AN AGREEMENT made this eleventh day of October, in the year One Thousand Eight Hundred and Ninety-eight, between The Eastern Dynamite Company, a Corporation of the State of New Jersey, party of the first part (hereinafter called the Selling Agents), and The Hancock Chemical Company, a Corporation organized under the Laws of the State of Michigan (hereinafter called the Company), party of the second part:

8351 WHEREAS, the Company has a factory, located in Houghton County, in the State of Michigan, and is engaged in the manufacture of a class of Powder of which nitro-glycerine is the chief explosive agent; and

WHEREAS, the majority of the stock is owned in the interest of certain mining companies located in the States of Michigan and Montana to which the Company supplies Powder and to which it is intended that it shall continue under this Agreement to furnish such supplies; and

8352 WHEREAS, the Selling Agents are desirous of securing from the Company a contract for the purchase from the Company of such part of its product as is not required by it to supply the mining companies hereinafter named:

NOW, THEREFORE, in consideration of the foregoing recitals and for other good and valuable consideration, IT IS AGREED between the parties hereto as follows:

FIRST: The Company will from time to time as requested by the Selling Agents manufacture and supply to the Selling Agents (within the limit of

the present capacity of the Company's works), such an amount of powder of which nitro-glycerine is the chief explosive agent, as the Company may reasonably be able to manufacture, after supplying all the Powder required by the Mining Companies hereinafter mentioned.

SECOND: The Company will at all times during the term of this Agreement keep and maintain its works (except as herein provided with respect to the mining companies with which it is identified) so that such works may at the option of the Selling 8354
Agents be utilized by the latter subject to the control of the Company for the manufacture of Powder by the Company, and the latter will not at any time during such term manufacture, sell, or deal in Powder of the character herein described other than that supplied to mining companies herein named, except upon the order and direction of the Selling Agents or with their written consent.

THIRD: There shall, at all times, during the term of the Agreement, be excluded from the operation of this contract all Powder manufactured by the Company to be supplied to the mines of the follow- 8355
ing-named companies and none other:

The Tamarack Mining Company.

The Osceola Consolidated Mining Company.

The Isle Royale Mining Company,

all located in the State of Michigan,

The Boston and Montana Consolidated Copper and Silver Mining Company, and

The Butts & Boston Consolidated Mining Company, located in the State of Montana.

FOURTH: The term of this contract shall begin on the first day of November, 1898, and the same shall continue for five years thereafter and from year to-

8356 *Plaintiff's Exhibit 1301*

year after the termination of said five years subject to the right of either party to terminate the same at the end of said term of five years or at the end of any year thereafter upon a previous written notice of not less than three months served by the party electing to discontinue the Agreement on the other party or on its successor in interest or its assigns.

FIFTH: If, however, either party to this Agreement shall make default in the performance of any of the conditions hereby required to be performed
8357 by them, the other party shall be at liberty if it so elects immediately after any such default to terminate this Agreement and it shall thereupon be and become relieved from all further obligation thereunder.

SIXTH: There shall be paid to the Company by the Selling Agents, their successors or assigns, as part of the consideration and inducement for the exclusive agency hereby granted, the sum of eighteen thousand dollars per year during each and every year of the continuance hereof, which payment shall be made in equal quarterly amounts on
8358 the fifteenth day of December, March, June and September, and which shall, in each instance, be and constitute a condition precedent to the continuance of this Agreement.

There shall be further paid for all merchandise that may be manufactured by the Company upon the order or direction of the Selling Agents, their successors or assigns, a sum equal to 15 per cent. over and above, the actual cost of manufacturing, the cost of delivering such merchandise to be borne by the Selling Agents. All the items which have heretofore entered into the estimate of the cost of the materials in the conduct of the Company's business as appears from its books of account shall

be regarded as part of the cost for the purposes of this Agreement.

Payments shall be made on the fifteenth day of each month for all merchandise shipped by the Company during the preceding month, without discount.

SEVENTH: Either party may assign this Agreement or any of its rights thereunder, but such assignment shall in no event relieve the parties hereto or any of them from any of the obligations or 8360
liabilities assumed hereunder.

IN WITNESS WHEREOF, the parties hereto have respectively caused their corporate seals to be hereto attached and this Agreement to be signed by their duly authorized officers, the day and year first above written.

EASTERN DYNAMITE CO.,
J. A. HASKELL, Pres.
[SEAL]

Attest:
EDWARD GREENE, 8361
Secretary.
HANCOCK CHEMICAL CO.,
W. E. BARNALL, Prest.,
[SEAL]
J. HALDANE EDWARDS,
Secretary.

Plaintiff's Exhibit No. 1328.

MEMORANDUM OF UNDERSTANDING between J. A. HASKELL, party of the first part, and A. O. FAY, party of the second part:

WHEREAS, it seems desirable that the present relative relation as regards proportions of trade be-

8362 *Plaintiff's Exhibit 1328*

tween the two parties to this understanding for the interests they represent, should be maintained until discontinued in accordance with the following provisions.

IT IS AGREED that during the year ending June 30th, 1896, and thereafter from year to year unless notice of discontinuance is given by either party to the other in writing, three months in advance of June 30th, as between the parties hereto, the said parties shall be entitled to the same proportion
8363 of trade as that enjoyed by each during the year ending June 30th, 1895.

Immediately upon the consummation of this written memorandum, or as soon thereafter as practicable, said C. A. Fay shall submit to the Adjuster a sworn statement giving the total number of pounds sold by him during the year ending June 30th, 1895, in the United States, it being understood that export sales shall not be considered as entering into or forming a part of the understanding covered by this Memorandum.

8364 As soon as practicable after sixty days from the beginning of this understanding shall elapse and at the end of similar periods thereafter as long as it is continued in operation, said A. O. Fay shall submit to the adjuster a sworn statement of his sales during sixty days.

The Adjuster when in possession of sworn statements of each of the parties to this understanding shall thereupon ascertain whether said A.O. Fay has exceeded his proportion of the business as ascertained from a careful computation of the total business done by the parties hereto from the beginning of the contract year to and including the last report, and the Adjuster shall at once notify said A. O. Fay of his status as regards his quota to the time of the latest reports during his contract year.

As soon as reports are received for the whole

year ending June 30th, 1896, and thereafter from year to year during the life of this understanding, said A. O. Fay is to be advised as to whether he has exceeded his proportion of the aggregate business done or fallen below it and by how many pounds.

Upon receipt of such advice, in case the said Fay has oversold his quota he shall pay to said J. A. Haskell a sum equal to two (2) cents per pound for such oversales. On the other hand, in case it shall be found that the said Fay has not sold his proportion of business during the year he shall be 8366 paid two (2) cents per pound by the said Haskell on his deficiency.

A Standing Committee shall be formed, composed of four (4) parties selected by said Haskell and one (1) party selected by said Fay, who shall meet together pursuant to the call of the Secretary, monthly, either the same day or as near to the so-called Board of Trade meetings as may be deemed advisable.

The Standing Committee shall have power to designate prices at which sales shall be made by the parties to this understanding and shall take up, 8367 consider and determine upon any complaints of violation of this understanding or the rules hereafter promulgated, or such instructions as may hereafter originate from said Standing Committee.

In case either party should hereafter purchase any High Explosive Companies and in such purchase the other party does not participate, thereafter during each year a percentage of the aggregate pounds sold by all parties, equal to the total sales of the Company purchased, for the year preceding time of purchase of such Company, shall be deducted from the gross business done by the parties to this understanding before the computation of the said Fay's oversales or undersales shall be made.

8368 *Plaintiff's Exhibit 1328*

The following rules intended to protect the parties to this understanding in their own trade are hereby promulgated and will continue in effect until others are made by the Standing Committee:

1st: Neither party shall interfere with any trade held by the other, either exclusively or jointly with another Associate, by quoting the latter's customer, either direct or through an agent, a lower price for the same or any other grade than that at
8369 which they are being supplied direct or through an agent; nor shall any rebate, allowance or commission be made to the customer reducing the net amount received from him.

2nd: When one party shall by mistake or otherwise, take away the trade of the other by a reduction in price, and the facts are demonstrated, the party taking such trade shall pay to the party entitled to the trade on all orders after said demonstration a penalty equal to all the profit between an assumed cost of seven cents per pound for 40%
8370 at the works and the price at which the former seller was selling when such trade was diverted, so long as the goods are sold below the original price; the party having lost the trade may retain it at the best price possible.

3rd: No customer or employe of a customer of one party shall be taken as agent by the other.

4th: An "Agent" shall be defined as one who is regularly employed on salary, or one who has a storage magazine and sale of consigned stock. The following is Rule 4 as agreed upon between Eastern and Aetna under date of February 6th and 9th, 1903.

Plaintiff's Exhibit 1328 8371

Rule 4—

> An "Agent" shall be defined as one who is regularly employed on a salary, or one who has a storage magazine and sale of consigned stock. The operation of the A. S. & D. Company which relieves agents from the care of consigned stock not to affect the meaning and intent of this rule."

5th: When one or two purchases of dynamite 8372
are made by one party's customer to cover an emergent demand with no intention on the part of the purchaser of continuing the use of such dynamite, such temporary purchase shall not change the status of the trade.

6th: Trade has been diverted from an associate by an outside competitor shall still be considered as belonging to such associate and may not be acquired by another until after the expiration of six months and an additional three months if requested. 8373

7th: The party in deficiency at last statement of status when any open contract work comes up for competition shall be the one to represent and protect the joint interests by bidding as low as he may deem wise for said trade. Upon agreement, however, party in deficiency may waive right to bid for such trade.

8th: A lower price on fuzes, fuse or caps than that at which a party is selling, which shall divert trade in dynamite, shall be considered as a reduction in the price of dynamite.

8374 *Plaintiff's Exhibit 1328*

this understanding shall be considered as joint trade and no reduction in price shall be made by one party without previous consultation with, or notice to, the other.

10th: Consolidation of customers sold by both parties shall constitute joint trade.

11th: The offer of a gift, loan or sale of a powder box or storage magazine shall be made only to
8375 trade held exclusively by the party making the offer.

12th: Whenever an associate can do so without detriment to other interests he may at the request of another associate holding any trade exclusively name higher prices if asked to quote on such trade. No change in prices or rules, especially affecting the said Fay shall be made by the Standing Committee without the consent of his representative.

For the purpose of computation of quotas and the adjustment thereon hereafter the Chicago
8376 Drainage Canal business shall be excluded.

This understanding shall take effect immediately upon the signature of this memorandum.

WHEREAS, on or about August, 1895, a memorandum of understanding between J. A. Haskell, party of the first part, and A. O. Fay, party of the second part, was signed by each of the parties thereto, in which the following clauses appeared:

> "It is agreed that during the year ending June 30th, 1896 and thereafter from year to year unless notice of discontinuance is given by either party to the other in writing, three months in advance of June 30th as between the parties hereto, the said parties

Plaintiff's Exhibit 1328 8377

shall be entitled to the same proportion of trade as that enjoyed by each during the year ending June 30th, 1895."

"In case either party should hereafter purchase any High Explosive Companies and in such purchase the other party does not participate, thereafter during each year a percentage of the aggregate pounds sold by all parties, equal to the total sales of the company purchased, for the year preceding time 8378
of purchase of such company, shall be deducted from the gross business done by the parties to this understanding before the computation of the said Fay's oversales or undersales shall be made."

THEREFORE, for a clearer understanding as between the two parties, the following information is furnished and is intended to form a part of said memorandum of understanding.

The sales of the party of the first part (The Pe- 8379
pauno Chemical Company, The Hercules Powder Company, The Atlantic Dynamite Company, The Sterling Dynamite Company and The Lake Superior Powder Company) during the year ending June 30th, 1895, amounted to 12,988,184 pounds, while the sales of the party of the second part amounted to 1,553,933 pounds.

The basis quota therefore of the party of the second part amounted to 10.68% of the total sales.

During the year ending June 30th, 1898, the sales of both parties to this memorandum of understanding were 20,250,465 lbs.
of which Companies purchased by the party of the first part, viz:

8380 *Plaintiff's Exhibit 1328*

The Hecla Powder Company, New York Powder Company and Clinton Dynamite Company, (in which purchase the party of the second part did not participate) sold 1,858,198 lbs.

the proportion of the party of the second part for the adjustment thereafter became 9.7015%.

During the year ending June 30th, 1887, certain other purchases were made by the party of the
8381 first part of companies (Acme Powder Company, Enterprise High Explosives Company and The Standard Explosives Company, Limited) whose aggregate sales during the year preceding date of purchase had amounted to 1,095,618 lbs.

This further reduced the quota of the party of the second part to 9.[illegible]345%

During the year ending January 31st, 1898, purchase was made by the party of the first part of the United States Dynamite Company, whose sales during the year preceding date of purchase amounted to 342,512 lbs.

8382 reducing the quota of the party of the second part to 9.0976%

During the sixty days ending April 30th, 1898, purchase made by the party of the first part of the Mount Wolf Dynamite Company, whose sales during the year preceding the time of purchase amounted to 109,810 lbs.

further reducing the quota of the party of the second part to 9.0567%

During the sixty days preceding July 1st, 1898, purchase was made by the party of the first part of the Columbian Powder Company, whose sales during year preceding time to purchase aggregated 153,225 lbs.

reducing the quota of the party of the second part to 9%

Plaintiff's Exhibit 1328 8383

During the year ending January 1st, 1899, purchase was made by the party of the first part of The American Forcite Powder Manufacturing Company, whose sales during the year preceding time of purchase amounted to 2,972,115 lbs. making the quota of the party of the second part 8.0879%

During the month of January, 1899, purchase was made by the party of the first part of the Blue Ridge Powder Company, whose sales during the preceding year amounted to 171,680 lbs. 8384 reducing the quota of the party of the second part to 8.0399%

During the sixty days preceding August 31st, 1899, purchases was made by the party of the first part of the Dittmar Powder & Chemical Company, whose sales during the preceding year aggregated 561,200 lbs. reducing the quota of the party of the second part to 7.9102% on which basis the sales from September first, 1899 to date, have been computed. 8385

Until further modifications are effected by purchase by the party of the first part in which the party of the second part does not participate, or vice versa, the proportions as agreed upon in accordance with this memorandum and the original memorandum to which reference is above made, are 98.0898% to the party of the first part, 7.9102% to the party of the second part.

Executed by the parties named, this day of , 1899.

J. A. HASKELL,
A. O. FAY.

8386 **Plaintiff's Exhibit No. 1329.**

Memorandum of agreement entered into this the thirty-first day of December, 1897, by and between The Eastern Dynamite Company, a corporation of the State of New Jersey, and the Aetna Powder Company, a corporation of the State of Indiana, hereinafter designated the parties of the first part, and the King Powder Company, a corporation of the State of Ohio, hereinafter designated the party of the second part.

8387 Whereas, the party of the second part desires to enter into the High Explosives business more actively than heretofore, it is agreed as follows:

That in consideration of the party of the second part agreeing to sell, during the life of this agreement, high explosives manufactured by the Companies, owned and controlled by the parties of the first part, and no other, the parties of the first part agree to furnish to the party of the second part such quantities of High Explosives as the party of the second part may require for re-sale up to but

8388 not exceeding three (3%) per cent of the number of pounds of High Explosives sold by the parties hereto, or Companies controlled by them in the United States and under the following terms and conditions:

1st.—The party of the second part is to adopt a brand for the goods it is to sell.

2d.—The parties of the first part are to select some one of the Companies controlled by them, with whom, from time to time the party of the second part is to transact its business, make its returns and receive instructions as to prices, terms, etc., at and under which Powder covered by this agreement is to be sold. Until further notice, however,

 8389

the Aetna Powder Company shall be the concern to which this clause refers.

3d.—From time to time hereafter as the party of the second part shall place orders with the representative of the parties of the first part, they shall cause to be furnished the requisite amount of grades required to be manufactured with due care, and to be equal in quality to similar grades of Atlas powder.

8390

4th. Within thirty days after the end of the month of March, June, September and December the party of the second part shall transmit check and statement covering the transactions of the preceding quarter as follows:

Payment shall be made for all powder delivered during the preceding quarter at the rate of eight (8) cents per pound, delivered at Pittsburgh, Chicago, St. Louis, Cincinnati and Ashburn for forty (40%) per cent. powder, and for other grades above or below forty (40%) per cent. at the same rate of increase or decrease as shall appear in the schedule of selling prices for delivery at Chicago. The foregoing price of eight (8) cents is based upon the present price of One and Fifty-five hundredth cents per pound for Nitrate of Soda, and nine and one-half (9½) cents per pound for Glycerine, a corresponding advance or decrease to be made hereafter in the advance or decrease in price of either or both after thirty days' notice given by the representative of the parties of the first part to the party of the second part. 8391

Statement shall be rendered, and payment made of and for one-half of the profit resulting from the powder sold during the preceding quarter, to be

8392 *Plaintiff's Exhibit 1329*

ascertained by deducting from the gross recepits the actual freight paid and commission allowed by the party of the second part, together with one-quarter of a cent per pound for magazine expense and haulage on all powder accounted for, it being presumed that the remaining half retained by the party of the second part will be a fair compensation for selling and guaranteeing collections.

4th. In case during any year of the life of this
8393 agreement the sales of the party of the second part shall exceed three (3%) per cent of the total sales of the parties hereto, or the companies they control on the number of pounds exceeding said three (3%) per cent, the party of the second part agrees to return to the parties of the first part the rate of profit they shall have retained under clause 3.

5th. The party of the second part agrees in selling to follow the rules and regulations of the price Committee of the parties of the first part as communicated by their representative. It being under-
8394 stood that they shall be furnished with and sell at the prices fixed for the Companies controlled by the parties of the first part, exception being made when trade is threatened by outside competitors or large contracts where it is deemed advisable for some one company to make a lower price to a former or large customer.

6th. The party of the second part agrees to refrain from selling in the so-called anthracite region and in the Neutral Belt.

7th. As soon as possible after the end of February, and at the end of each sixty (60) days thereafter, the representative of the parties of the first part shall communicate to the party of the second

part information as to the amount the party of the second part is authorized to sell under the terms of this agreement, in order that it may restrict itself to its allotment.

8th. This agreement shall be in force for ten (10) years from the date hereof, and thereafter from year to year unless written notice be given by either party of its desire to terminate it three months prior to December 31st, 1907, or at the end of any year thereafter. 8396

Witness our hands and seals this the day and year aforesaid.

EASTERN DYNAMITE COMPANY,
Attest: J. A. HASKELL,
EDWARD GREENE, Pres.
(Seal) Secretary.

AETNA POWDER CO.,
A. O. FAY, Prest.
RALPH M. FAY, Sec'y.

THE KING POWDER CO., 8397
By G. W. PETERS, Pres.
J. H. MCKIBBON,
Sec'y.
(Seal)

8398 **Plaintiff's Exhibit No. 1330.**

Memorandum of agreement entered into this the first day of May, 1901, by and between The Eastern Dynamite Company, a corporation of the State of New Jersey, and the Aetna Powder Company, a corporation of the State of Indiana, hereinafter designated as the parties of the first part, and The King Powder Company, a corporation of the State of Ohio, hereinafter designated as the party of the second part.

8399 WHEREAS the parties hereto, under date of December 31st, 1897, entered into an agreement whereby the party of the second part acquired the right to sell dynamite manufactured by the parties of the first part under certain conditions, and

WHEREAS, for certain reasons, the party of the second part now desires to retire from the active sale of dynamite.

It is agreed that, commencing with the date of this instrument until the expiration of the contract above referred to, The King Powder Company releases all claims to the dynamite business, either as manufacturer or seller, for the consideration of Twenty-four hundred dollars ($2,400.00) per annum to be paid quarterly at the end of each quarter until the termination of said contract.

8400

WITNESS our hands and seals the day and year first above written.

THE EASTERN DYNAMITE COMPANY,
J. A. HASKELL, President.
THE AETNA POWDER COMPANY,
A. O. FAY,
THE KING POWDER COMPANY,
G. E. PETERS, President.

Plaintiff's Exhibit No. 1331. 8401

Memoranda of agreement entered into this 7th day of September, A. D. 1904, by and between the King Powder Company, a corporation under the laws of the State of Ohio, party of the first part, and the Eastern Dynamite Company, a corporation under the laws of the State of New Jersey, and the Aetna Powder Company, a corporation under the laws of the State of Indiana, parties of the second part.

WITNESSETH, that WHEREAS, the party of the first 8402
part has heretofore established in various parts of the United States a trade in dynamite, and in such business has acquired the exclusive right to use that certain brand or trade mark "REX," which mark or brand has been affixed to the dynamite sold by it to its customers; and

WHEREAS, the party of the first part has heretofore sold and assigned to the parties of the second part, their agents, successors or assigns, its said dynamite business and the good-will thereof, together with the exclusive right to make and vend the dynamite heretofore sold by it, and to affix 8403
the brand or mark "REX" to said dynamite, subject to the conditions and limitations, and for the consideration hereinafter set forth:

THEREFORE, it is agreed between the parties hereto that, in consideration of the covenants, agreements and conditions hereinafter mentioned, to be fully kept and performed by the parties of the second part, the party of the first part has sold, and by these presents does sell unto the parties of the second part, their successors and assigns, for the period hereinafter designated, its dynamite business and the good-will thereof, and the exclusive right to make and vend the dynamite heretofore sold by it, and the exclusive right to use in the

8404 *Plaintiff's Exhibit 1331*

business hereby conveyed the "REX" brand or trade mark, and to affix said brand or trade mark to dynamite made or sold by the parties of the second part.

In consideration of the sale of said business and the assignment of said "REX" trade mark or brand, the parties of the second part hereby agree to and with the party of the first part, to pay to the party of the first part, its successors or assigns, the sum of Twenty Four Hundred ($2400.00) Dollars per annum, payable quarterly, at the end of each quar-
8405 ter, as the said sum may become due, commencing at the date hereof and terminating on the 31st day of December, 1907, at which time all of the above rights will be relinquished, and said brand or trade mark "REX" will be reassigned by the parties of the second part to the party of the first part, and without compensation.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their respective Presidents, and their corporate seals to be hereto affixed and attested by their respective Sec-
8406 retaries on this 7th day of Sepjtember, A. D. 1904.

THE KING POWDER COMPANY,

Witnesses: By A. O. FAY,

Witnesses: By G. M. PETERS,

(Seal) A. M. BEEKLEY, President.

E. F. GARRETT. Attest: J. J. MCKIBBON,

Secretary.

THE EASTERN DYNAMITE COMPANY,

Witnesses: By J. A. HASKELL,

(Seal) J. J. MOONMAN, President.

CHARLES COPELAND.

Attest: ALEXIS I. DU PONT,

Secretary.

THE AETNA POWDER COMPANY,

(Seal) F. M. PENFIELD, President.

J. C. ROGERS. Attest: ADDISON G. FAY.

Plaintiff's Exhibit No. 1332. 8407

AGREEMENT made this 20th day of February in the year One Thousand Eight Hundred and Ninety-nine, between the Eastern Dynamite Company, a corporation of the State of New Jersey, and The Lake Superior Powder Company, a corporation of the State of Michigan, hereinafter referred to as the parties of the first part, and The Aetna Powder Company, a corporation of the State of Indiana, hereinafter referred to as the party of the second part.

WHEREAS, on the 11th day of October, 1908, a 8408
contract was entered into between The Eastern Dynamite Company, one of the parties hereto of the first part, and the Hancock Chemical Company, a corporation of the State of Michigan, whereby the said The Eastern Dynamite Company became the Selling Agent for all goods manufactured by said The Hancock Chemical Company, excepting those sold to mines controlled by the stockholders of said The Hancock Chemical Company, and

WHEREAS, said contract was for the benefit and account of the party of the second part as well as 8409
the parties of the first part.

IT IS HEREBY AGREED that during the life of said contract any expense pertaining to it shall be borne as follows:

Two-thirds of said expense upon the basis of Ninety-one and one-tenth per cent. (91.1 per cent.) to the parties of the first part and Eight and nine-tenths per cent (8.9 per cent.) to the party of the second part, one-third of said expense to be upon the basis of the sales actually made by the parties of the first and second parts, respectively, in the so-called Lake Superior Region.

IN WITNESS WHEREOF the parties hereto have respectively caused their corporate seals to be hereto

8410 *Plaintiff's Exhibit 1333*

attached and this agreement to be signed by their duly authorized officers the day and year first above written.

EASTERN DYNAMITE CO.,
J. A. HASKELL, Pres.

Witness: OTIS LE ROY.

LAKE SUPERIOR POWDER CO.,
J. A. HASKELL, Vice-Prest.

Witness: OTIS LE ROY.

AETNA POWDER CO.,
8411 A. O. FAY, Prest.

Plaintiff's Exhibit No. 1333.

AN AGREEMENT made this 31st day of Oct. in the year Eighteen Hundred and Ninety-eight between the Lake Superior Powder Company, a corporation organized under the laws of the State of Michigan, and the Aetna Powder Company, a corporation organized under the laws of the State of Indiana, hereinafter called the First Parties, and
8412 the Hancock Chemical Company, a corporation organized under the laws of the State of Michigan, hereinafter called the Company, party of the second part:

WHEREAS, the Company did on the eleventh day of October in the year 1898 enter into an agreement with the Eastern Dynamite Company, a corporation of the State of New Jersey, hereinafter called the Selling Agents, a copy of which contract is annexed hereto and made part of this agreement; and

WHEREAS, the First Parties are interested in having the conditions of the said contract carried out by the Selling Agents,

NOW, THEREFORE, in consideration of the foregoing recitals and for other good and valuable consideration the First Parties hereby covenant and

agree with the Company that they hereby guarantee the performance of all and several the covenants and agreements made by the Selling Agents in said contract, and that upon the failure of the said Selling Agents to carry out any conditions or obligations of said contract the First Parties will assume the obligations of the said Selling Agents in the same manner and with the same force as though the said first parties had entered into the contract with the company themselves.

THE LAKE SUPERIOR POWDER CO., 8414

[SEAL] By C. H. CALL, Pres.

Attest: J. C. REYNOLDS, Sec'y.

THE AETNA POWDER CO.,

[SEAL] W. B. LEWIS, Vice-Prest.

Attest: RALPH M. FAY, Sec'y

Plaintiff's Exhibit No. 1334.

MEMORANDUM OF AGREEMENT entered into this first day of October, A. D., 1898, by and between THE CALIFORNIA POWDER WORKS, party of the first 8415 part; THE GIANT POWDER COMPANY, CONSOLIDATED, party of the second part; THE JUDSON DYNAMITE & POWDER COMPANY, party of the third part (the said parties of the first, second and third parts being all corporations of the State of California, and collectively hereinafter referred to as the Western Companies; THE AETNA POWDER COMPANY, a corporation of the State of Indiana, party of the fourth part; and THE EASTERN DYNAMITE COMPANY, a corporation of the State of New Jersey, party of the fifth part (the said parties of the fourth and fifth parts being collectively hereinafter referred to as the Eastern Companies.)

WHEREAS, the parties hereto are and have been doing business in the Republic of Mexico in ex-

8416 *Plaintiff's Exhibit 1334*

plosives and blasting apparatus and it is necessary, in order to avoid disastrous competition between them that they shall agree upon reasonable prices and credits, and other reasonable rules and regulations for the conduct of their business within the said Republic, so as to produce a margin of profit to them therefrom.

NOW, THEREFORE, for and in consideration of the premises and of the mutual covenants, undertakings, and promises hereinafter contained, the several companies, parties hereto, do mutually covenant and agree with each other, jointly and severally, in the manner following, that is to say:

8417

FIRST.

The parties hereto have prepared a schedule which is hereunto annexed, marked Schedule A, setting forth reasonable prices, terms of credit and rules for conducting sales in the Republic of Mexico, exclusive of the territory not now being operated in by the Eastern Companies, and described as follows:

8418

Tepec, Territory of Qepic.
San Blas, Territory of Qepic.
Topia, Territory of Durango.
Hermosillo, Territory of Sonora.
Culiacan, Territory of Sinaloa.
Guaymas, State of Sonora.
Altata, State of Sinaloa.
Mazatlan, State of Sinaloa.
Torres, State of Sonora.
Alamos, State of Sonora.
Agiabampo, State of Sonora.
Santa Anna, State of Sonora.
Magdalena, State of Sonora.
La Paz, State of Lower California.

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Tonala, State of Chiapas.
Salina Cruz, State of Caxaca.
Acapulco, State of Guerrero.
Santa Rosalia, State of Lower California.

And the territory tributary thereto, and also the exclusive territory of the Eastern Companies to be "described as the State of Yucatan, the State of Campeche, the State of Tobasco, and that portion of the State of Vera Cruz south of the line of the Mexican Railway but not including the points 8420
along the line of that road," and the same may be changed from time to time in the manner hereinafter provided, but it shall at all times, in the form in which it shall then exist be deemed to be a part of this agreement, and they agree that they will not, during the continuance of this agreement sell or agree to sell or dispose of, or agree to dispose of any article or articles specified in the said schedule within the said portion of the Republic of Mexico described above for any lower price or prices, or upon any other terms, or in any manner contrary to any rules sets forth in said schedule, 8421
or as it may be changed from time to time, and will not either directly or indirectly make, permit, suffer, take part in, countenance or benefit by an arrangement, practice or device whatever, under color of which any provision of said Schedule or of this Agreement or of the end to be accomplished thereby may be evaded or frustrated.

SECOND.

In case any article or articles mentioned in the schedule of prices and credits shall during the continuance of this agreement be sold or agreed to be sold in the portion of the Republic of Mexico covered by this agreement by any of the parties hereto

8422 *Plaintiff's Exhibit 1334*

in violation of the said schedule of prices and credits, or of any of the rules of the(?) for the conduct of business in Mexico, therein provided for, or any provision of this Agreement, then and in every such case there shall be conclusively presumed to arise thereby from the party making such sale to each of the other parties to this agreement, in equal shares, damages to the total amount of fifteen per cent. of the gross selling price of all said articles so sold. And in case said violation of
8423 this agreement results in the diversion of trade, as long as the aggressor continues to hold it, he shall incur the penalty hereinbefore named on trade so diverted.

NOTE. In case as adjudged such violation results in the acquisition of a larger portion of a joint trade, as indicated by reference to the proportions enjoyed by the respective parties during the preceding six months, the penalty shall apply on the increased portion of business so resulting and enjoyed by the offending party

8424

THIRD

A Board of Representatives for Mexican business to consist of two members is hereby created for the purposes, and with the powers and duties hereinafter prescribed. The said Board is herein described, and may at all times be referred to as the Representatives. One of its members shall be appointed by the Western Companies, and one by the Eastern Companies.

FOURTH.

Should any of the parties hereto have reason to believe that any other party or parties have committed a breach of this agreement, it will at once communicate such information in writing to its

representative, if charge is made against a company other than those he represents) to investigate said complaint and impose penalty if complaint be found to be justified and so acknowledged by the offending party. If, however, the Representative or Representatives are unable to dispose of the matter to the satisfaction of all concerned within sixty days (or ninety days if application for an extension be made by both parties in writing, there shall be appointed as arbitrators by the Representatives, two disinterested principals, who shall have power to appoint a third, if they find it necessary to arrive at a decision in the premises to act as a Board of Arbitrators, and whose decision shall be final. 8426

The Board of Arbitrators shall have power to call for sworn statements on the part of the principals or their employees if they shall deem it necessary, and to order the examination of all books or records of either side by an auditor.

If the Board of Arbitration shall find the breech to have been committed by a party to this agreement through its officers or employees, the penalties prescribed in Clause 2 shall apply. If, on the other hand, they shall find that the offense is the act of an sub-agent, to whose books, access cannot be had, and the officers and employees of the offending party are nowise to blame, they may prescribe as a penalty such disciplinary measures as they deem wise, such as the withdrawal of the agency, etc., etc., but the party having committed the breach as aforesaid, may, at its option, ask to have the penalty prescribed in Clause 2 apply instead of the disciplinary measures proposed. 8427

FIFTH.

Any expenses attending the investigation and adjudication of a complaint of violation shall be

8428 *Plaintiff's Exhibit 1334*

assessed on the offending party, should the case be deemed by the Board of Representatives or Board of Arbitrators to have been proved. Should, however, the case be decided in favor of the accused, the expenses of investigation and arbitration shall be borne in equal parts by all the parties hereto.

SIXTH.

No action shall be brought, nor shall any defense be maintained by any of the parties to this agree-
8429 ment, in any Court of Law or Equity, for and in respect of any difference arising under or by reason of this agreement, unless, and until all such matters in difference shall be submitted to the arbitrament of the Reprecentatives or Board of Arbitration hereinbefore provided for and an award made thereon. And every such award shall in all courts and places be taken and deemed to be prima facie proof of the liability or non-liability therein declared, and throw upon the party denying the same the burden of disproving all matters contained in or implied
8430 by such award.

SEVENTH (Cancelled 10-13-'99).

A Board to be known as the Board of Mexican Agents is hereby created, which shall consist of the general agent in Mexico of each company signing this Agreement, and the Representative of A. Phipp & Company, the General Agents of the Standard Explosives Company, and which shall perform the duties hereinafter prescribed.

EIGHTH (Cancelled 10-13,'99).

Each company shall, and will, within thirty days from the date of this agreement, notify the Representatives of the name of its General Agent in Mex-

8431

ico. The meetings of the Board of Agents shall be held in the City of Mexico. The Board of Agents shall elect a Chairman from among their number and he shall have a vote on all resolutions. The said Board of Agents shall also elect a Secretary-Treasurer, who shall see that accurate records are kept of the transactions of the Board, and who shall have charge of the disbursements necessary in defraying the expenses of the Board, and assess upon each member his proper proportion of such expenses.

NINTH (Cancelled).

8432

A Recorder shall be appointed by the Board of Agents, who may be an employee of any General Agent, but who shall not be engaged in any outside business. The Recorder shall have a separate office in the City of Mexico, and will be required to be present at that office during at least a designated portion of each business day, for the purpose of supplying the several General Agents with any information they may require as to rules, schedules, records, etc. The duties of the Recorder shall be to keep complete records of instructions, prices, schedules, rulings and to have custody of all official documents pertaining to the actual working of this agreement, and to attend to all clerical work in connection with the Board of Agents. He shall also keep a record of the sub-agents of each company, entering thereon all changes which may be made from time to time, and shall send to each General Agent and to each party to this Agreement copies of minutes of each meeting immediately after adjournment.

8433

TENTH (Cancelled 10-13-'99).

The office of the Recorder shall be the place of

8434 *Plaintiff's Exhibit 1334*

business for the Board of Agents, at which their meetings will be held. The Board of Agents shall have power to provide for itself, such assistance, stationery and other conveniences, as may, in its opinion, be necessary for the performance of its duties. All the expenses of the said Board of Agents shall be borne and paid in equal parts by the several companies, signing this agreement, and the Standard Explosives Company.

ELEVENTH (Cancelled 10-13-'99).

8435 Immediately upon the execution of this agreement it shall be the duty of the Board of Agents to convene, organize and fix the dates of their regular meetings, such regular meetings to be held at least once each month, and special meetings of the Board shall be called at any time upon the written request of any two General Agents or immediately upon the receipt of instructions from the Representatives, the intention being that such instructions when received shall be immediately promulgated by means of a meeting of the Board and it shall be the special duty of the Board to see that a uniform letter or telegram is written by each
8436 General Agent notifying all of his sub-agents of each and every change in the rules and schedule of prices and credits, such uniform notices to be delivered to the Recorder to be by him immediately forwarded to their several destinations by mail or telegraph, as may be most expedient.

A General Agent absenting himself from the City of Mexico shall designate some person who shall represent him at any meeting of the Board of Agents held for the promulgation of instructions received from the Representatives, and it shall be the duty of the Board of Agents to hold meetings for the promulgation of such instructions on the

8437

day they are received and put them in effect immediately.

TWELFTH (Cancelled 10-19-'99).

It shall be the duty of the Representatives to notify the Board of Agents in the City of Mexico of any and every change in the schedule of prices and credits or rules for conducting Mexican business; and in case at any time, joint instructions are forwarded by the Representatives that seem to conflict with the agreements, rules, etc., the Board of Agents will, nevertheless, proceed at once to carry out such 8438
instructions and adhere strictly to them until they are modified or revoked by further advices received by mail or wire from the Representatives. A telegram signed with the names of both Representatives, shall be deemed as official.

THIRTEENTH (Cancelled 10-13-'99).

At the first meeting of the Board of Agents, it shall be the duty of each General Agent to supply the recorder with a complete list of all sub-agents that they each have in that portion of the Republic of Mexico covered by the agreement, and it shall furthermore be their duty to promptly notify the 8439
Recorder in writing of any change or alteration that may be made in the sub-agents, the intention being that there shall always be on file in the office of the Recorder a correct list of all the sub-agents of the several Companies.

The duties of the Board of Agents shall consist in the supervision and examination of the manner in which the provisions of this agreements are being observed by the General Agents and sub-agents, and other employees of the several Companies, and to report from time to time to the Representatives hereinbefore constituted, the manner in which the

8440 *Plaintiff's Exhibit 1334*

provisions of this agreement are being observed by the general agents, sub-agents and employees of the several companies parties hereto.

FOURTEENTH (Cancelled 10-13-'99).

The Board of Agents shall have no power to alter, add to, or amend in any manner or to allow any deviation of any kind whatsoever from the prices, terms, or rules set forth in Schedule A hereunto annexed, without the concurring consent
8441 in writing, or by wire of each of the Representatives hereinbefore constituted.

FIFTEENTH (Cancelled 10-13-'99).

In case the Board of Agents or a majority thereof, shall deem it advisable, that the schedule of prices and terms, or any of the rules for their government should be changed, they shall by resolution recommend to the Representatives such changes as they deem advisable, and may give their reasons therefor in writing and a copy of same shall be forthwith forwarded by the Secretary of the Board of Agents to each of the Representatives.
8442 Each and every member of the Board of Agents, shall at the foot of every recommendation sign his name and signify how he has voted upon the said recommendation, and may give his reasons for his vote, or propose a substitute for the recommendation adopted, if he shall see fit.

SIXTEENTH (Cancelled 10-13-'99).

Alterations in the schedule of prices, credits and rules for Mexican business may be made in the following manner, and not otherwise, that is to say:

1. If all the Companies signing this agreement

8443

shall agree to any change and so certify in writing to their respective Representatives, the said Representatives shall immediately communicate the change in writing or by telegraph to the Chairman and Secretary of the Board of Agents in Mexico, and upon the receipt of such communication from both Representatives, or concurring communications from each, the change so unanimously agreed upon shall go into effect immediately, or at such other time as may be indicated in the communication or communications from the Representatives.

8444

2. Upon a recommendation from the Board of Agents in Mexico the Representatives may adopt the change recommended, or any other change which they may deem preferable, if they shall be empowered to do so by all the companies they represent. The Representatives of the Eastern Companies shall immediately, on receipt of advices of the change recommended, notify each of his companies by letter or telegram of the proposed change, and the Representatives of the Western Companies shall in like manner notify each of his Companies of the proposed change. If any Company shall within fourteen days after the receipt of the advice of the proposed change by the Representatives, object to the change by letter or telegraph, delivered to either of the Representatives, then on the expiration of the fourteenth day after the receipt of advice, the Representatives shall transmit information of said disapproval to the Board of Agents.

8445

SEVENTEENTH.

In the event of attacks upon the trade of any party to this agreement by any other manufacturer not a party to this agreement, the party whose trade is attacked may, having first obtained permission from MR. H. H. BARKSDALE, and CAPTAIN JOHN

8446 *Plaintiff's Exhibit 1334*

BERMINGHAM, have authority to defend that trade against such outside competition within such limitations as may at the time be fixed by Mr. Barksdale and Captain Bermingham.

In case the party whose trade is attacked should not desire to defend its trade as herein provided, then it shall be permissable for Mr. Barksdale and Captain Bermingham to authorize the Standard Explosives Company to take such steps as they may designate to meet the threatened outside competition, in order that the common interests may
8447 be conserved, the profits from said trade being credited to the parties to this agreement in their proper quota proportions. Notices shall be given to the several companies by the Representatives of any action taken by Captain Bermingham and Mr. Barksdale in accordance with this clause.

EIGHTEENTH.

An examination by auditors shall be made at least semi-annually, and in case a written request shall be made by all of the Western Companies for an audit of the Eastern Companies' books (or vice versa) before the expiration of any semi-annual
8448 period, such request shall at once be complied with.

It is specifically agreed that no matter what other parties to this agreement may do or may be reported to have done, each of the parties hereto agrees that until they shall have been relieved from the provisions of this agreement by the expiration of the time required for retirement from it, under the provisions hereof they will continue to comply with its provisions and have recourse only to the means of redress hereinbefore named.

It is furthermore agreed that the retirement of one or more parties shall not terminate this agreement, and that all remaining shall continue to be

Plaintiff's Exhibit 133½

8449

NINETEENTH.

bound by its provisions unless it is agreed to terminate it by mutual consent of all then party to it.

TWENTIETH.

It is furthermore provided that nothing contained in the foregoing agreement shall in any way abridge or remove from any of the parties hereto any rights, liabilities or obligations incurred by reason of deviations from the agreement of March first, 1898, occurring during the life of said agreement, namely, between March 1st, 1898, and September 30th, 1898, and that an audit shall be made of the business done during the period, indicated under the agreement of March 1st, 1898, within six weeks from the date of this instrument.

8450

TWENTY-FIRST.

This agreement shall go into effect on the first day of October, A. D., 1898, and shall continue in force until the thirty-first day of December, A. D., 1899, and from year to year thereafter, unless it should be terminated in the manner following, that is to say: On or before the thirtieth day of September, A. D., 1899, or on or before the same day of any year thereafter, any of the parties hereto may give notice in writing to each of the other parties that at the end of the year in which the notice is given it desires to withdraw from the agreement, and thereupon at the end of such year the party serving such notice shall be relieved of the obligations imposed by the agreement, which shall continue in force as far as the other parties are concerned until dissolved by mutual consent.

8451

8452 *Plaintiff's Exhibit 1334*

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed by their several and respective Presidents or General Managers,, and to be sealed with their common seals the day and year first above written.

THE CALIFORNIA POWDER WORKS,
By J. BERMINGHAM, Prest.
THE GIANT POWDER COMPANY, CON.,
J. SONTAG, Gen'l Manager,
THE JUDSON D. & P. Co.,
Ed. G. LUKENS, P.
8453
AETNA POWDER Co.,
A. O. FAY, Prest.
Attest: RALPH M. FAY, Secretary.
EASTERN DYNAMITE Co.,
J. A. HASKELL, Prest.
Attest: EDWARD GREENE, Secretary.

MEMORANDUM OF AGREEMENT supplementary to the agreement of October first, eighteen hundred and ninety-eight (October 1st, 1898), relating to Mexican business, entered into this Thirteenth day of October, eighteen hundred and ninety-nine (1899), by and between the California Powder
8454 Works, party of the first part, the Giant Powder Company, Consolidated, party of the second part; the Judson Dynamite & Powder Company, party of the third part (the said parties of the first, second and third parts being all corporations of the State of California); the Aetna Powder Company, a corporation of the State of Illinois, party of the fourth part; and the Eastern Dynamite Company, a corporation of the State of New Jersey, party of the fifth part.

WHEREAS, it has been determined that the present Board of Agents in Mexico and the office of Recorder shall be abolished,

Plaintiff's Exhibit 1334

8455

IT IS AGREED that Clauses Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Fifteen and Sixteen of the Agreement of October first, 1898, shall be considered as null and void on and after this date, and that from this date Rule H of the schedule attached to said agreement of October first, 1898, is amended to omit the words "and with the Board of Agents," and that all other references to the Board of Agents or Recorder in the said agreement, rules, schedules, etc., are hereby cancelled.

8456

IT IS ALSO AGREED that the following additional clauses shall be considered as part and parcel of the agreement of October first, 1898, and shall be binding upon the parties hereto in the same force and degree as the other rules, etc., governing the relations of the parties hereto to the Mexican trade and to each other.

ADDITIONAL CLAUSE 1.

And it shall be the duty of the representatives to notify the General Agents of each of the Companies in the City of Mexico of any and every change in the schedule of prices and credits or rules for conducting Mexican Business; and in case at any time instructions are forwarded by the Representatives that seem to conflict with the agreements, rules, etc., the General Agents will, nevertheless, proceed at once to carry out such instructions and adhere strictly to them until they are modified or revoked by further advices received by mail or wire from the Representatives.

8457

ADDITIONAL CLAUSE 2.

Alterations in the schedule of prices, credits and

8458 *Plaintiff's Exhibit 1334*

rules for Mexican business may be made in the following manner, and not otherwise, that is to say: If all the parties to this agreement shall agree to any change and so certify in writing to their respective Representatives, the said Representatives shall communicate the change in writing or by telegram to each of the General Agents in Mexico, the notifications being forwarded by either representative after prior agreement with the other to the General Agents of each of the Companies, authority being given to the Representatives by each
8459 Company at the time of expressing its acceptance of the proposed change to attach their signature to the notification so sent to its General Agent.

IN WITNESS WHEREOF, the parties hereto have fixed their hands and seals the day and the year hereinbefore written.

CALIFORNIA POWDER WORKS,
By J. BERMINGHAM, President.
GIANT POWDER COMPANY., CONS.,
By JULIAN SONNTAG, General Manager.
JUDSON DYNAMITE & POWDER COMPANY,
By ED. G. LUKENS, President.
8460 THE AETNA POWDER COMPANY,
By A. O. FAY, President.
EASTERN DYNAMITE COMPANY,
By J. A. HASKELL, President.

8461

Plaintiff's Exhibit 1348.

(Received July 1, 1903, Miami Powder Co.)
Concerning the Advisory Committee.
Meeting of May 27th, 1903.

On motion duly made and seconded.

That in case a recommendation is made by the Advisory or Special Committee for a contract, that said recommendation shall only be good for sixty (60) days; or in the case of a renewal of a contract for sixty (60) days from the date of the expiration of the previous contract. A new application to be made in case it be desired to extend this time. Carried.

8462

It was Resolved: That when a special price or a price under a contract has been recommended to be made to a Contractor, a customer, based upon deliveries in carloads, and when a smaller quantity shall be desired by such a Contractor for the purpose of finishing the work he has in hand, a shipment may be made from a Distributing Point or a Mill Point at the price at which carloads have been sold to said customer, he to pay the freight thereon to the point of destination. And that the practice, which has prevailed, of taking back, in such cases, unused portions of carloads be discontinued.

8463

On motion duly made and seconded.

That the action taken at the last meeting regarding Peoria, Ill., be reconsidered. Carried.

On motion, after discussion, the following was adopted.

Whereas the Peoria Committee recommended a certain course of action as regards customers at or near Peoria, Ill., which was adopted at the meeting of the Advisory Committee held April 17th, 1903, and which has been rescinded, be is resolved, That Peoria be continued as a Distributing Point, and

8464 *Plaintiff's Exhibit 134*

that the sale of Sporting powder through agents there be continued as heretofore. Concerning Blasting powder: That on June 1st, 1903, or as soon thereafter as existing contracts with agents will permit, no allowance for haulage from railroad depot to magazine at Peoria shall be made in excess of three (3) cents per keg, and no allowance for haulage from railroad depot shall be made on any powder that is not actually delivered in magazine. Furthermore, interested parties are advised that they may discontinue the present agency agree-
8465 ments as far as they may pertain to sales to the former customers of their agents at Peoria, using less than 1,200 kegs per annum, and heretofore being sold, presumably, at the schedule price for lots of less than carloads ($1.50); in such cases, and to their former customers only, it shall be permitted to sell at any price in excess of $1.25 per keg. Reports to be made to the principal at not less than $1.25 per keg, net, to him for the goods, as the same had rested in the magazine, at Peoria. Shipments to be made to said magazines in not less than 400 keg lots.

8466 For recommendations as to special prices, contracts, etc., see pages following.

Recommendations which had been made on the dates named below, were confirmed as follows:

E. I. du Pont de Nemours & Company:—.

1903.

April 16th. To make a contract with the American Smokeless Coal Co., Huntington, Ark., successor to the Prairie Creek Coal Co., at $1.50 per keg, allowing rebate of 17½c per keg, with equity of 45% to the Equitable Powder Mfg. Company.

April 20th. To renew its contract with the Sloss-Sheffield Steel & Iron Co., Birmingham, Ala., at

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$1.45 per keg, allowing rebate of 30c per keg.

April 21st. To renew its contract with the Cantrall Co-operative Coal Company, Centrall, Ill., at $1.35 per keg, allowing rebate of 15c per keg.

April 22nd. To renew its contract with the Republic Iron & Steel Co., Springfield, Ill., at $1.35 per keg, allowing rebate of 15c per keg.

To renew its contract with the Williamsville Coal Co., Williamsville, Ill., at $1.35 per keg, allowing rebate of 15c per keg.

To renew its contract with the Capital Coal Company, Springfield, Ill., at $1.35 per keg, allowing 8468
rebate of 17½c per keg.

To renew its contract with the Virden Coal Company, Virden, Ill., at $1.35 per keg, allowing rebate of 20c per keg, including the West End Coal Company, Springfield, Ill.

April 22nd. To renew its contract with the Citizens' Coal Mining Co., Lincoln, Ill., at $1.35 per keg, allowing rebate of 15c per keg.

To renew its contract with the Greenview Coal & Mining Company, Greenview, Ill., at $1.35 per keg, allowing rebate of 17½c per keg.

To renew its contract with the Barclay Coal & Mining Company, Barclay, Ill., at $1.35 per keg, al- 8469
lowing rebate of 15c per keg.

April 23rd. To make a special price of $1.10 per keg, in carloads, to P. F. Brendlinger for work on the Pennsylvania Railroad cut off between Columbia and Parkersburg, Pa.

To renew its contract with the Spaulding Coal Company, Springfield, Ill., covering the Clear Lake Co-operative Coal Company, Clear Lake, Ill., and the Nillwood-Carbon Coal Co., Nillwood, Ill., at $1.35 per keg, allowing rebate of 20c per keg.

To make a special price of $1.05 per keg, in carloads, and $1.15 per keg in less than carloads, delivered around Pittsburgh, to Booth & Flynn, of Pittsburgh, Pa.

8470 *Plaintiff's Exhibit 1348*

April 24th. To renew its contract with the Jones & Adams Company, Springfield, Ill., at $1.35 per keg, allowing rebate of 20c per keg.

To increase to 15c per keg, the rebate under its contract with the Auburn & Alton Coal Company, Alton, Illinois.

To increase to 17½c per keg the rebate under its contract with the Victor Coal Company, Pawnee, Ill.

To increase to 15c per keg, the rebate under its contract with the Athens Mining Company, Athens,
8471 Ill.

To increase to 15c per keg the rebate under its contract with the Collier Co-operative Coal Company, Peoria, Ill.

To increase to 17½c per keg, the rebate under its contract with the Citizens' Coal Mining Company, Springfield, Ill.

To increase to 10c per keg the rebate under its contract with the Forest Fuel Company, Otley, Iowa.

To increase to 15c per keg the rebate under its contract with the Illinois & Iowa Fuel Company, Ottumwa, Iowa.

8472 To increase to 10c per keg the rebate under its contract with Edward Little, Hilliard's Switch, Ill.

To increase to 17½c per keg the rebate under its contract with the Maplewood Coal Company, Farmington, Ill.

To increase to 17½c per keg the rebate under its contract with the Monmouth Coal Company, Norris, Ill.

To increase to 20c per keg the rebate under its contract with Newsam Brothers, Peoria, Ill.

To increase to 20c per keg, the rebate under its contract with the Des Moines Coal Mining Company, Des Moines, Iowa.

April 25th. To renew its contract with J. D.

Plaintiff's Exhibit 1348

8473

Crabb, Receiver of the Litchfield Coal Mining & Power Co., Litchfield, Ill., at $1.35 per keg, allowing rebate of 15c per keg.

To make a contract with the Clifton Coal Company, Harrisburg, Ill., at $1.35 per keg, allowing rebate of 15c per keg.

April 27th. To increase to 10c per keg the rebate under its contract with the Norris Supply Company, Norris, Ill.

To increase to 20c per keg, the rebate under its contract with the Wabash Coal Company, Springfield, Ill.

8474

To increase to 15c per keg the rebate under its contract with the Colfax Coal & Mining Company, Oskaloosa, Iowa.

To increase to 20c per keg the rebate under its contract with the Wapello Coal Company, Hiteman, Iowa.

To increase to 17½c per keg the rebate under its contract with the Sangamon Coal Company, Springfield, Ill.

To increase to 10c per keg the rebate under its contract with Walton Brothers, Fairbury, Ill.

To increase to 17½c per keg the rebate under its contract with the Springfield Co-operative Coal Company, Springfield, Ill.

8475

To increase to 17½c per keg, the rebate under its contract with the Star Coal Company, Streator, Ill.

April 29th. To increase to 20c per keg the rebate under its contract with the O. K. Coal Company, Bussey, Iowa.

May 4th. To increase to 17½c per keg the rebate under its contract with George H. Ramsey, as Manager, covering the Garfield Coal Company, of Beacon and Evans, Iowa.

To renew its contract with the Reincke Coal Mining Co., Madisonville, Ky., at $1.40 per keg, allowing rebate of 10c per keg.

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May 6th. To include the Pooz Coal & Coke Company, Lumberport, W. Va., under its contract with the Fairmont Coal Company, Fairmont, W. Va.

To make the rebat under its contract with J. B. Gardinee, Canton, Ill., 10c per keg from the schedule carload price.

To renew its contract with the Great Elk Company, Carbon Hill, Ala., at $1.45 per keg, allowing rebate of 10c per keg.

May 7th. To include the Davis Creek Coal Company, Rock Castle, Ala., under its contract with the
8477 Sloss-Sheffield Steel & Iron Co.

May 11th. To increase to 15c per keg the rebate under its contract with the Rainbow Coal & Mining Company, Caledonia, Indiana.

To renew its contract with the Franklin Iron Mfg. Co., Franklin Springs, N. Y., at $1.35 per keg, allowing rebate of 15c per keg.

May 18th. To increase to 10c per keg the rebate under its contract with Krapp & Lees, Coal Valley, Ill.

May 18th. To make a contract with C. C. Brown and Edwin Brown, covering supplies of the Woodside Coal Company, Springfield, Ill., and the
8478 Latham Coal Company, Lincoln, Ill., at $1.35 per keg, allowing rebate of 20c per keg, and that the contracts which the du Pont Company now have with the Woodside Coal Company and the Latham Coal Company be cancelled.

Laflin & Rand Powder Company:—

Apr. 20th. To renew its contract with the Sheppard & Company, Oskaloosa, Iowa, to cover the Colfax Consolidated Coal Company and the Norwood Coal Company for deliveries at Colfax, Des Moines, Foster and Berwick, Iowa, at the schedule carload price, either delivered or f.o.b. Mississippi River, allowing rebate of 20c per keg.

To make a special price of $1.30 per keg, in car-

8479

loads, to L. R. Wright & Company for work on the Bon Air extension of the N. C. & St. L. R. R.

Apr. 23rd. To make a special price of $1.05 per keg, in carloads, to the Roaring Run Stone Company, Curwensville, Pa.

To make a special price of $1.25 per keg, in carloads to Howarth & Taylor, Edwards, Ill., May 8th. To make a special price of $1.25 per keg to Gratoon & Jennings, Ridgwood, N. J. (successors to C. H. Strong & Son), in lots as wanted for delivery from its mills at Wayne, N. J.

8480

To make a special price of $1.20 per keg, in carloads, through the Wilmington High Explosives Companies, to Charles A. Sims & Company for work on the Pennsylvania lines west of Pittsburgh, Pa., between Yellow Creek and Summittville, Ohio.

May 13th. To make a special price of $1.05 per keg, in carloads, to E. R. Fleming, Houtzdale, Pa., to date from January 1st, 1903.

May 18th. To make a contract through the Wilmington High Explosives Companies, at $1.10 per keg, with D. F. Keenan for work on the Pennsylvania Railroad between Latrobe and Millwood, Pa., and a special price of $1.05 per keg, in carloads, to him on this work good for sixty days only.

8481

May 23rd. To renew its contract with the Wear Coal Company, Kansas City, Mo., covering its mines at Pittsburgh, Kansas; Vernon and Minden, Mo.; the mines of the Devlin-Wear Coal Company, Howard, Ark.; the mines of the Collinsville Mercantile Co., Collinsville, I. T.; the mines of the Murlin Fuel Company, at Revier, Mo.; the mines of the Southern Mansas Coal Co., at Scammon, Kansas, and the mines of the Wabash Coal Company at Huntsville, Mo., allowing rebate of 22½c per keg from the schedule carload price.

May 26th. To make a special price of $1.50 per keg, in carloads, f.o.b. Marshall, Col., through the

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Wilmington High Explosives Companies, to Gorge S. Good & Company, for work on the Denver Northwestern & Pacific Railroad, between Denver, Col., and Salt Lake City, Utah.

The Ohio Powder Company:—

May 12th. To make a special price of $1.64 per keg, in carloads, f.o.b. Columbia Falls, Montana, through the Wilmington High Explosives Companies, to Siems & Shields, for work on the Great Northern Railway there.

The Hazard Powder Company:—

8483 May 13th. To make a contract with the Cable Mercantile Company, covering the supplies of Cable & Company, coal operators, at Cable and Sherrard, Ill., at $1.35 per keg, allowing rebate of 17½c per keg.

May 18th. To include the Cherokee Colliery Company, McDowell, W. Va., under its contract with the Louisville Coal & Coke Co., which latter is included under its contract with J. J. Tierney.

May 23rd. To renew its contract with the Cable Mercantile Company, covering the supplies of Cable & Company, at Cable and Sherrard, Ill., at $1.35 per keg, allowing rebate of 20c per keg.

8484 May 25th. To make as pecial price of $1.30 per keg, in carloads, to Smith & Montague (Pyrities Mining & Chemical Company) of Detroit, Mich., with mines at Sebewaing, Mich.

American Powder Mills:—

April 30th. To make a special of $1.30 per keg, in carloads, f.o.b St. Paul, Minn., and $1.64 per keg, in carloads, f.o.b. Kalispell and Columbia Falls, Montana, to Siews & Shields for work on the Great Northern Railway at Columbia Falls.

To make a special price of $1.30 per keg in carloads, to L. R. Wright & Company, for work on the Bon Air extension of the N. C. L. R. R.

May 7th. To make a special price of $1.20 per keg, in carloads, f.o.b. St. Louis, Mo., to Kenefick &

8485

Hammand for work on the Missouri Pacific Railway from Aurora, Mo., to Buffalo, Ark.

To make a special price of $1.10 per keg, in carloads, to the Gardner-Wilmington Coal Company, Clark City, Ill.

March 30th. To make a special price of $1.25 per keg, to W. A. Guenthre & Sons, Owensboro, Ky., for one carload of Blasting powder.

Miami Powder Company:—

May 7th. To renew its contract with the Chapman Coal Company, Jackson, Ohio, with mines at Chapman, Ohio, at $1.35 per keg, allowing rebate of $15c per keg. 8486

To renew its contract with the Penwill Coal Mining Co., Pana, Ill., at $1.35 per keg, allowing rebate of 10c per keg.

To renew its contract with Morris Brothers, Coal Operators, Duquoin, Ill., at $1.35 per keg, allowing rebate of 10c per keg.

May 11th. To make a special price of $1.25 per keg, in carloads, to the Oskaloosa Powder Company, Oskaloosa, Iowa (Huber & Kablach Company, wholesale hardware).

May 12th. To make a special price of $1.25 per keg, in carloads, to the Churchill-Hemenway Company, Hardware Dealers, Galesburg, Ill. 8487

May 20th. To renew its contract with the Island Coal Company, Indianapolis, Ind., with mines near South Linton and Island City, Ind., at $1.35 per keg, allowing rebate of 20c per keg.

Austin Powder Company:—

April 20th. To make a special price of $1.05 per keg, in carloads, to the Salem Supply Company, Alsworth, Pa.

April 25th. To make a special price of $1.15 per keg, in carloads, to J. W. Ellsworth & Company, of Cleveland, Ohio, covering the Southern Coal & Transportation Company, the Oppenman Coal Com-

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pany, the Ellsworth Coal Company and the Wills Creek Coal Company.

May 7th. To make a special price of $1.35 per keg, in carloads, to the Fairfax & Roberts Hdw. Company, Bristol, Tenn.

May 15th. To make a special price of $1.17½ per keg, in carloads, to the Economy Coal & Mining Company, Danville, Ill.

Equitable Powder Mfg. Company:—

May 6th. To renew its contract with the Moweaqua, Coal Mining & Mfg. Company, Moweaqua,
8489 Ill., at $1.35 per keg, allowing rebate of 15c per keg.

May 7th. To renew its contract with the Sorento Coal Company, mines at Sorento, Ill., successor to the Sorento Prospecting & Mining Company, at $1.35 per keg, allowing rebate of 20c per keg.

May 12th. To increase to 20c per keg the rebate under its contract previously recommended to be made with the Girard Coal Co., Girard, Ill.

May 15th. To have an equity of 45% in the contract which has been recommended to be made by du Pont & Company with the American Smokeless Coal Company, Huntington, Ark.

The Phoenix Powder Mfg. Company:—

8490 May 25th. To renew its contract with the Kerens-Donnewald Coal Company, Worden, Ill., at $1.35 per keg, allowing rebate of 15c per keg.

Birmingham Powder Company:—

May 4th. To make a special price of $1.27½ per keg, in carloads, to:

Sam Brown, Pratt City, Ala
W. L. Delaney, Adger, Ala.
W. W. Jones, Adger, Ala.
E. M. Parsons, Adger, Ala.
Roberts & Wright, Adger, Ala.

Marcellus Powder Company:—

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8491

April 24th. To make a special price of $1.05 per keg, in carloads, through the Wilmington High Explosives Companies, to Victor Pezzoni, of Monongahela, Pa., covering also one carload already sold at this price.

Northwestern Powder Company:

May 6th. To make a special price of $1.25 per keg, in carloads, to the Wilfred Coal Company, Shelburne, Ind., including under this price one carload sold Jan. 9, 1903, and one carload sold April 28, 1903.

The King Mercantile Company:—

8492

May 6th. To make a special price, either direct, or through the Wilmington High Explosives Companies, to the Shutt Improvements Company of $1.20 per keg, in carloads, f.o.b. St. Louis, Mo., for work on the St. Louis, Kansas City & Colorado Railroad near Mona, Mo., and $1.20 per keg, in carloads, delivered, for work on the C. C. C. & St. L. R. R. (Big Four) between Lawrenceburg and Senaca, Indiana.

May 23rd. To make a special price of $1.20 per keg, in carloads, to the Imperial Colliery Company, Paint Creek, W. Va.

To make a special price of $1.25 per keg, in carloads, to the Cabin Creek Coal Company, Acme, W. Va.

8493

May 25th. To make a special price of $1.20 keg, in carloads, to the Star Coal Company, Red Star, W. Va.

Oriental Powder Mills:—

April 30th. To include the Osage Coal Company, Krebs, I. T., under its contract with the Great Western Coal & Coke Co., Wilburton, I. T.

May 13th. To renew its contract with the Pittsburg Coal Company, Henderson, Ky., allowing rebate of 15c per keg, with equity to The King Mercantile Company and the Hazard Powder Company.

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May 18th. To make a special price of $1.10 per keg, in carloads, to the Southern & Middle Creek Coal Company, Casselman, Pa., for the Middle Creek Coal Company.

Chattanooga Powder Company:—

May 7th. To make contracts with the East Tennessee Coal Company, the Jellico Coal Mining Company, the Oliver Coal Company and the Eagle Coal Company at $1.45 per keg, allowing rebate of 10c per keg, or special price of $1.35 per keg, in carloads, to the two last-named concerns.

8495 May 18th. To include the Red Ash Coal Company, Block and Careyville, Tenn., under its contract with the Block Coal & Coke Company.

May 25th. To renew its contract with the Sewanee Coal, Coke & Land Co., Clouse Hill, Tenn., at $1.45 per keg, allowing rebate of 10c per keg.

Laflin & Rand Powder Company, and E. I. du Pont de Nemours & Company:—

April 20th. Laflin & Rand Powder Co. to make a special price of $1.10 per keg, in carloads, to the Springfield Coal Mining Company, covering mines of the Black Diamond Coal Company at Springfield, Ill., and du Pont & Company to make the same
8496 special price to the Springfield Coal Mining Company, covering the mines of the Stearns Coal Company at Springfield, IIll., the Junction Coal Mining Co., at Springfield, Ill., and the Riverton Coal Company, Riverton, Ill.

To make a special price of $1.30 per keg, in carloads, through the Wilmintgon High Explosives Companies, to McCann & Lebling at Welch, W. Va.

April 24th. To make a special price of $1.25 per keg, in carloads, through the Wilmington High Explosives Companies, to Walton & Company, on an additional five miles of work on the N. & W. R. R. due west of Williamson, W. Va.

To make a special price of $1.25 per keg, in car-

8497

loads, through the Wilmington High Explosives Companies, to Walton, Whitten & Graham Company, at Welch, W. Va., for work on the N. & W. R. R. on the Tug River.

To make a special price of $1.05 per keg, in carloads, through the Wilmington High Explosives Companies, to the Smith Construction Company, for work on Section No. 8, known as the Valley Creek Section of the Parkersburg and Columbia cut off of the Pennsylvania Railroad.

To make a special price of $1.05 per keg, in carloads, through the Wilmington High Explosives 8498
Companies, to the Pinkerton Construction Company for work on Section No. 9. known as the Dowington Section of the Parkersburg and Columbia cut off of the Pennsylvania Railroad.

To make a special price of $1.05 per keg, in carloads, through the Wilmington High Explosives Companies, to Reiter, Curtis & Hill, of Philadelphia, Pa., on section No. 4, known as the Glenlock Section of the Parkersburg and Columbia cut off of the Pennsylvania Railroad.

April 25th. To make a special price of $1.05 per keg in carloads, through the Wilmington High Explosives Companies, to the Degnon-McLean Con- 8499
struction Company on about eight miles of work on the Western Maryland Railroad near Baltimore, Md.

April 28th. To make a special price of $1.30 per keg, in carloads, through the Wilmington High Explosives Companies, to the Mason & Hoge Company, for work on the Louisville & Nashville Railroad extension from Altoona to Gadsden, Ala.

May 1st. To make a special price of $1.20 per keg, in carloads, through the Wilmington High Explosives Companies, to Bennett & Talbott on about two miles of work on the main line of Baltimore & Ohio Railroad near Flushing, Ohio.

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8500 May 18th. To make a contract, through the Wilmington High Explosives Companies, at $1.10 per keg, with Reiter, Curtis & Hill for work on the Pennsylvania Railroad between Trimmers Rock and Newport, Pa., and a special price of $1.05 per keg, in carloads, to them on this work, good for 60 days only.

To make a special price of $1.10 per keg, in carloads, through the Wilmington High Explosives Companies, to T. F. Kearns & Sons for work on the Middle Division of the Pennsylvania Railroad from
8501 Newport to about Millerstown, Pa.

Miami Powder Company and Laflin & Rand Powder Company:—

May 18th. To make a special price of $1.20 per keg, in carloads, to the Weaver Coal & Coke Company, including one carload sold by the Laflin & Rand Powder Company, April 13th, 1903.

May 2nd. The Laflin & Rand and du Pont Companies to make, through the Wilmington High Explosives Companies, and Austin direct, a special price of $1.05 per keg, in carloads, to the Brodhead Contracting Company, for work on the Alleghany & Western Railroad, a branch of the Beasemer & Lake Erie Railroad between Chicora and Karns
8502 City. Pa.

May 11th. Laflin & Rand and du Pont Companies to make, through the Wilmington High Explosives Companies, and Austin direct, a special price of $1.25 per keg, in carloads, for deliver at Huntington, W. Va., to the Miller Supply Company; and $1.30 per keg, in carloads, for delivery at Bluefield, W. Va., with the understanding that the powder sold at this price is only for trade which the Miller Supply Co. has formerly handled.

The King Mercantile Company, Oriental Powder Mills, Laflin & Rand Powder Company and E. I. du Pont de Nemours & Company:—

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May 15th. To make a special price of $1.10 per keg, in carloads, to Rinehart, Dennis & Company for work on the Wabash Railroad from the Pennsylvania-West Virginia State line to Fairmont, W. Va.

Birmingham Powder Company, Chattanooga Powder Company and E. I. du Pont de Nemours & Company:—

April 20th. To make a special price of $1.30 per keg, in carloads, to Dunn & Lallande for work on the Louisville & Nashville Railroad extension from Altoona to Gadsden, Ala.

8504

American Powder Mills and The King Mercantile Company:—

May 1st. American Powder Mills to make a special price of $1.25 per keg, in carloads, to W. A. Guenthre & Sons, Owensboro, Ky., for their own trade, and the King Mercantile Company to make the same price to W. A. Guenther & Sons for the:

Field Coal Company, Island, Ky.
Mud River Coal & Mining Co., Mud River, Ky.
J. A. Moores, Bavier, Ky.
Aberdeen Coal Mining Co., Spottsville, Ky.
Guenthre & Koltinsky Coal Co., Deanfield, Ky.

Austin Powder Company, and The King Mercantile Company:—

8505

May 4th. The King Company to make a special price of $1.05 per keg, in carloads, through the Wilmington High Explosives Companies, to J. G. Corcoran for work on the Wabash Railroad about ten miles from Hanlin, Pa., and nine miles from Wellsburg, W. Va., and Austin Company to make this same price to him direct for this work.

The King Mercantile Company, and Laflin & Rand Powder Company:—

May 26th. To make a special price of $1.50 per keg, in carloads, f.o.b. Marshall, Col., through the Wilmington High Explosives Companies, to Orman

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& Crook, for work on the Denver, Northwestern & Pacific Railroad between Denver, Col., and Salt Lake City, Utah.

American Powder Mills, Laflin & Rand Powder Company and E. I. du Pont de Nemours & Company:—

May 4th. To make a special price, allowing rebate of 15c per keg, in carloads, from the schedule carload price to the McArthur Brothers Company for work on the extension of the Wabash Railroad from Zanesville, Ohio, to Parkersville, W. Va.

8507 To make a special price, allowing rebate of 15c per keg, in carloads, from the schedule carload price, to the McArthur Brothers Company for work on the Frisco Railroad from St. Louis, Mo., to Crystal City, Mo.

May 23rd. American to make a special price of $1.20 per keg, in carloads, f.o.b. St. Louis, Mo., to J. W. Creech, for work on the C. R. I. & P. R. R. near St. Louis, and du Pont and Laflin & Rand to make this same price to him, through the Wilmington High Explosives Companies.

Austin Powder Company, and Oriental Powder Mills:—

8508 May 6th . To make a special price of $1.05 per keg, in carloads, to F. C. Beall, Frostburg, Md.

The King Mercantile Company, Laflin & Rand Powder Company, and E. I. du Pont de Nemours & Company:

May 18th. To make a special price of $1.10 per keg, in carloads, through the Wilmington High Explosives Companies, to C. D. Langhorne & Company for work on the Chesapeake & Ohio Railroad at White House, Ky.; Richmond, Va., and Prince, W. Va.

The Ohio Powder Company, Miami Powder Company and The King Mercantile Company:—

May 20th. To make a special price of $1.25 per

8509

keg, in carloads, to the Northwest Coal Company, covering the mines near Deavertown, Ohio, absorbed by it, formerly owned by the Bearfield Coal Company.

Laflin & Rand Powder Company:—

May 21st, 1903. To make a special price of $1.05 per keg, in carloads, to the Kearney Supply Store Company, Kearney, Bedford County, Pa., successor to Joseph E. Thropp.

May 18th. That the schedule carload price of "B" Blasting powder at Dawson, New Mexico, be $1.77 per keg. 8510

May 26th. That the schedule carload price of "B" Blasting powder at Red Lodge, Montana, be $1.92 per keg.

Indiana Company:—

April 24th. To make a special price of $1.20 per keg, in carloads, to the Collins Coal Company, Brazil, Ind., and to Harder & Hafer, Star City, Ind., including the Hymera Coal Mining Co., Hymera, Ind,

May 6th. To renew its contract with the Texas & Pacific Mer. & Mfg. Co., Thurber, Texas, at $1.60 per keg, allowing rebate of 17½c per keg.

8511

EDWARD GREENE,
Secretary.

Plaintiff's Exhibit 1349.

The Special Committee reports having made recommendations as follows:—

Received Oct. 3, 1903, Miami Powder Co.

E. I. du Pont de Nemours & Company:—

June 1st, 1903. To renew its contract with the

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Princeton Coal & Mining Company, Princeton, Ind., at $1.35 per keg, allowing a rebate of 15c per keg.

To renew its contract with the Thomas Coal Company, Evansville, Ind., at $1.35 per keg, allowing rebate of 10c per keg.

To renew its contract with the Sunnyside Coal & Coke Company, Evansville, Ind., at $1.35 per keg, allowing rebate of 15c per keg.

To renew its contract with the Ludwig Coal Company, Daleton, Ohio, at $1.35 per keg, allowing rebate of 15c per keg.

8513 June 8th. To make a contract with the John Archbold Coal Company, Evansville, Ind., at $1.35 per keg, allowing rebate of 15c per keg.

June 15th. To cancel its contract with the Alabama Consolidated Coal & Iron Company, Birmingham, Ala., which expires Oct. 1st, 1903, and to make a new contract with this concern for three years at $1.15 per keg.

June 17th. To make a special price of $1.35 per keg, in carloads, to the Knapp & Spencer Co., Sioux City, Iowa.

June 18th. To make a special price of $1.15 per keg, in carloads, to A. F. Kelly, delivered at Peale, Patton, Rossiter and Barnesboro, Pa., covering the 8514 Clearfield Bituminous Coal Corporation, and the Empire Coal & Coke Company.

June 18th. To make a special price of $1.15 per keg, in carloads, to James Mellon, Patton, Pa.

To make a special price of $1.15 per keg, in carloads, to the West Virginia Grocery & Candy Company, Fairmont, W. Va.

June 25th. To make a special price of $1.20 per keg, in the Crescent Coal Company, Evansville, Ind., for one carload of powder sold in March, 1903, and to make a contract with that concern at $1.35 per keg, allowing rebate of 15c per keg.

June 29th. To make a special price of $1.15 per

8515

keg, in carloads, to the Stull-Hill Coulter Company, Leechburg, Pa.

Laflin & Rand Powder Company:—

June 1st. To make a special price of $1.55 per keg, in carloads, f.o.b. Pueblo, Col., and $1.65 per keg in carloads, f.o.b. Florence, Co., to the Colorado-Portland Cement Company, Portland, Colorado.

June 8th. To include the Black Diamond Coal Company, Runnels, Iowa, and the Spring Creek Coal Company, Oskaloosa, Iowa, under its contract with Sheppard & Company.

8516

June 8th, 1903. To renew its contract with the Central Coal & Coke Company at $1.45 per keg, subject to rebate of 30c per keg, delivered as wanted at mines at Pittsburg, Scammon, Litchfield, Nelson and Weir City, Kansas, and at $1.45 per keg, subject to rebate of 25c per keg, in carloads, f.o.b. Panama, Mo., or 5c per keg, less than these prices if necessary.

June 17th. To make a special price of $1.10 per keg, in carloads, through the Wilmington High Explosives Companies to Millard & McGraw for work on the Trenton cut off of the Pennsylvania Railroad, shipping point, Langhorne, Pa.

8517

June 20th. To make a contract for three years with the Union Coal & Coke Company with mines near Trinidad, Colorado, allowing rebate of 15c. per keg from the schedule price.

To renew its contract with the White Walnut Coal Company, Pinckneyville, Ill., at $1.35 per keg, allowing rebate of 15c per keg.

To make a special price of $1.10 per keg, in carloads to the Mahoning Supply Company, Punxsutawney, Pa., covering the Rochester & Pittsburg Coal & Iron Co., at Welston, Adrian, Eleanore, Helvetia and other operations in Pennsylvania, and including also Abbott & Blakeslee at Coal Glen.

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June 22nd. To make a special price of $1.15 per keg in carloads to the Webster Coal & Coke Company, for delivery at:

Ehrenfield, Bens Creek,
Beaverdale, Gallitzen,
Amsbury, Hastings,
Nanty Glo, Moss Creek,
Irvona, Crosson,

and including the Pennsylvania Coal & Coke Com-
8519 pany at Gallitzen, Pa.

June 25th. To make a special price of $1.10 per keg, in carloads, through the Wilmington High Explosives Companies, to George A. Ferguson & Company for three miles of work on the extension of the B. & O. R. R. from Buckhannon to Phillippi, W. Va.

To make a special price of $1.25 per keg, in carloads, to the Central Coal & Coke Company, successor to the Elmwood Coal & Mining Company, with offices at Chicago, Illinois, and operating at Elmwood, Ill.

June 27th. To make a contract for one year with
8520 the Crescent Coal Mining Company at Hopewell, Six Mile Run and Portage, Pa., at $1.25 per keg, allowing rebate of 10c per keg.

June 29th. To make a special price of $1.30 per keg, in carloads, through the Gray & Dudley Hardware Company, to Ethan Philbrick, a general contractor, for work on the Southern Railway at Cornelia, Ga.

Austin Powder Company:—

June 20th. To make a contract with the United States Coal Company, of Sturgis, Ky., successor to the Paducah Coal Company, allowing rebate of 10c per keg from the schedule carload price.

To renew its contract with the Massillon Coal &

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Mining Company, Massillon, Ohio, covering the Bloomer Coal Company, Bloomer, W. Va., allowing rebate of 22½c per keg from the schedule carload price.

The Hazard Powder Company:—

June 1st. To renew its contract with J. A. Boone, Manager, covering:

Brown Coal Company, Nuttall, W. Va.

Boone Coal & Coke Company, Boone, W. Va.

Blume Coal & Coke Company, Lookout, W. Va.

Michigan Coal Company, Fayette, W. Va.

Fayette Coal & Coke Company, Fayette, W. Va. 8522

At $1.35 per keg, allowing rebate of 15c per keg.

To renew its contract with the Michigan Coal & Mining Company, Bay City, Mich., at $1.40 per keg, allowing rebate of 10c per keg.

To renew its contract with the Mount Carbon Company, Powellton, W. Va., at $1.35 per keg, allowing rebate of 10c per keg.

To renew its contract with the Island Valley Coal & Mining Company, Linton, Ind., at $1.35 per keg, allowing rebate of 17½c per keg.

Phoenix Powder Mfg. Company:—

May 29th, 1903. To make a special price of $1.20 per keg, in carloads, f.o.b. Chicago, Ill., to J. W. Powell, for work on the extension of the C. R. & P. R. R. from Amarillo, Texas, to Tucumcari, N. M. 8523

To make a special price of $1.10 per keg, in carloads, to J. S. Hull and the McArthur Brothers Company on 90 miles of work on the Charleston, Clendennin & Sutton Railroad from Otter to Sutton, W. Va.

June 8th. To make a special price of $1.35 per keg, in carloads, to Frank McGinnigle for work on the St. Louis & North Arkansas Railroad.

June 11th. To make a special price of $1.25 per keg, in carloads, to the Walnut Hill Coal Company, Belleville, Ill.

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June 12th. To make a special price of $1.20 per keg, in carloads, f.o.b. Sharpsburg, Ohio, to D. J. Griffith for work on the extension of the Wabash Railroad from Zanesville, Ohio, to Sharpsburg, Ohio.

June 24th. To make a special price of $1.20 per keg, in carloads, delivered at Forsythe Junction, St. Louis, Mo., to the Chicago, Rock Island & Pacific Railroad, for construction and betterment work on the St. Louis, Kansas City & Colorado Railroad from Forsythe Junction to the Osage River in Mis-

8525 souri.

June 24th, 1903. To make a special price of $1.20 per keg, in carloads, f.o.b. St. Louis, Mo., and $1.45 per keg, in carloads, f.o.b. Earlsboro, O. T., to Shippey & Outzen for work on the Oklahoma & Texas extension on the Missouri, Kansas & Texas Railroad from Oklahoma City to Coalgate, I. T.

Oriental Powder Mills:—

June 1st, 1903. To make a special price of $1.20 per keg, in carloads, to the McKell Coal & Coke Company, McDonald, W. Va.

June 9th. To make a special price in carloads to Williams & Schmis, Granville, N. Y., of $1.85 per

8526 keg, for "A," and $1.25 per keg for "B" Blasting Powder.

To make a special price of $1.20 per keg, in carloads, to F. H. Blodgett & Company for work on an electric line from Newark to Zanesville, Ohio.

June 12th. To make a special price of $1.25 per keg, in carloads, to the Tirre Coal & Mining Company, Lensburg, Ill.

June 17th. To make a special price of $1.20 per keg, in carloads, to T. F. Ryan for work on the Pittsburg, Fort Wayne & Chicago Railroad at Smithville, Ohio.

To make a special price of $1.15 per keg, in carloads, to the Brown Mining Company, Punxetawney, Pa., for delivery there only.

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June 24th. To make a special price of $1.10 per keg, in carloads, and $1.25 per keg in less than carloads, to the Union Supply Company, Scottdate and other points in Pennsylvania.

To make a special price of $1.15 per keg, in carloads, to W. P. Lee, Sutton, West Virginia, for delivery there only.

June 27th. To make a special price of $1.15 per keg, in carloads, to the West Virginia Coal Company, Morgantown, W. Va.

The King Mercantile Company:—

8528

May 27th. To make a special price of $1.20 per keg, in carloads, to the Winifrede Coal Company, Winifrede, W. Va.

June 4th. To make a special price of $1.20 per keg, in carloads, to the Allegheny Ore & Iron Company and the Victoria Coal & Coke Company, with headquarters at Clifton Forge, Va., ore mines at Oriskany nad Goshen, Va., and coal mines at Caperton, W. Va., also deliveries at McDowell, Allegheny County, Va.

June 8th. To make a special price of $1.25 per keg, in carloads, to the Crane Cheek Coal & Coke Company and the Pinncale Coal & Coke Company, McComas, W. Va.

8529

June 17th. To make a special price of $1.15 per keg, in carloads, to the Shipley Hardware Company, Meyersdale, Pa., for delivery there only.

June 17th, 1903. To make a special price of $1.15 per keg, in carloads, to the Kenneweg Company, Cumberland, Md., for delivery there only.

To make a special price of $1.15 per keg, in carloads, to the Carnegie Oil & Powder Company, Carnegie, Pa., for delivery there only.

To make a special price of $1.15 per keg, in carloads, to the Potomac Hardware Company, Cumberland, Md., for delivery there only.

To make a special price of $1.15 per keg, in car-

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loads, to the Kane & Keyser Hardware Company, Belington, W. Va.

June 18th. To make a special price of $1.15 per keg, in carloads, to Armstrong, Crislip, Day & Company, Clarksburg, W. Va.

To make a special price of $1.15 per keg, in carloads, to the Hibner & Hoover Hdw. Company, Du Bois, Pa.

Chattanooga Powder Company:—

June 9th. To renew its contract with the Jennifer Furnace Company, Connelsville, Ala., at $1.45
8531 per keg, allowing rebate of 10c. per keg, with privilege of increasing same to 15c. per keg, if the purchases amount during a year to more than 2,400 kegs; additional rebate to be allowed only on purchases thereafter.

June 20th. To put a clause in its contract recently recommended to be made with the Sewanee Coal, Coke & Land Company, Clouse Hill, Tenn., to the effect that if the consumption during the year amounts to more than 2,400 kegs, the rebate may be increased to 15c. per keg on purchases after that quantity has been reached, but such additional rebate is not to apply on earlier purchases.

8532 June 25th. To renew its contract with the Pineville Coal Company or the Pineville Investment Company, Pineville, Ky., at $1.45 per keg, allowing rebate of 15c. per keg.

American Powder Mills:—

June 8th. To make a special price in carloads of 15c. per keg less than schedule carload price, to the Utah Construction Company, on 14 miles of work on the Denver & Rio Grande Railroad, from Howard towards Salida, Colorado.

June 22d. To make a special price in carloads, allowing rebate of 15c. per keg from the schedule price, to the Missouri Construction Company for one mile of work on the White River Extension of

8533

the Missouri Pacific Railroad north of Buffalo City, Ark.

June 25th. To renew its contract with the Central Coal & Coke Company, covering its mines in Wyoming at $1.45 per keg, in carloads, f.o.b. Missouri River, allowing rebate of 30c. per keg.

Mimai Powder Company:—

June 4th, 1903. To include the Twentieth Century Coal Company, with mines at Redfield and Cannelville, Ohio, under its contract with the Hamilton-Wallace Coal Company, Saltillo, Perry County, Ohio.

8534

June 9th. To include the Orris Coal Company, Zanesville, Ohio, with mines at Crooksville, Ohio, under its contract with the Zanesville Coal Company, Zanesville, O.

To renew its contract with the Columbus & Hocking Coal & Iron Company, office at Columbus, Ohio, mines at Longstreth, Murray City, Straitsville, Buchtel and Doanville, Ohio, at $1.35 per keg, allowing rebate of 10c. per keg.

June 13th. To make a special price of $1.15 per keg, in carloads, to C. C. Martin & Company, wholesale grocers, Parkersburg, W. Va.

8535

June 22d. To renew its contract with the Imperial Coal Mining Company, Columbus, Ohio, with mines at Nelsonville, Doanville and New Lexington, Ohio, at $1.35 per keg, allowing rebate of 10c. per keg, or 15c. per keg, provided its consumption shall amount to 2,400 kegs during the year; the rebate of 15c. per keg, however, to be allowed only on purchases subsequent to the time when 2,400 kegs have been bought.

June 24th. To rene wits contract with the Odin Coal Company, Odin, Ill., at $1.35 per keg, allowing rebate of 15c. per keg.

June 25th. To renew its contract with William Goddard, covering the Tilden Coal Company and

the Crystal Coal Company, Tilden, Ill., at 1.35 per keg, allowing rebate of 10c. per keg.

June 26th. To make a special price of $1.20 per keg in carloads, to the Chicago, Cincinnati & Louisville Railroad on work between Cincinnati, Ohio, and Richmond, Ind.

Sycamore Powder Mills:—

June 25th. To make a contract with the St. Bernard Mining Company, for delivery at Earlington, Mortons Gap and Providence, Ky., at $1.10 per keg, in carloads.

8537 Birmingham Powder Company:—

June 26th. To renew its contract with the Gilreath Coal & Iron Company, Pocahontas, Ala., at $1.45 per keg, allowing rebate of 15c. per keg.

Indiana Powder Company:—

May 29. To make a special price of $1.20 per keg, in carloads, f.o.b. Mississippi River, through the Wilmington High Explosives Companies, to O'Hearn Brothers and Jerry Connelly, for thirty miles of work on the C. O. & G. R. R. extension between Amarillo, Texas, and Tucumcari, New Mexico.

June 4th, 1903. To make a special price of $1.30
8538 per keg, in carloads, f.o.b. Missouri River, through the Wilmington High Explosives Companies, to O'Hearn Brothers and Jerry Connelly, for thirty miles of work on the C. O. & G. R. R. extension between Amarillo, Texas, and Tucumcari, New Mexico.

June 8th. To make a special price of 1.25 per keg, in carloads, to the Knox Coal Company, Bicknell, Indiana.

June 25th. To make a special price of $1.25 per keg, in carloads, to Powers & Williams, Streator, Ill.

June 27th. To make a special price of $1.17½

per keg, in carloads, to the Antiock Coal Company, Linton, Ind.

Oriental Powder Mills and Austin Powder Company:—

June 18th. To make a special price of $1.15 per keg, in carloads, to F. C. Beall, Frostburg, Md.

The King Mercantile Company and Laflin & Rand Powder Company:—

June 20th. To make a special price of $1.15 per keg, in carloads, to W. M. Scott & Company, Carnegie, Pa.

Oriental Powder Mills, The King Mercantile 8540
Company, American Powder Mills, Laflin & Rand Powder Company, and E. I. du Pont de Nemours & Company:—

June 20th. To make a special price of $1.10 per keg, in carloads, through the Wilmington High Explosives Companies and American direct, to McArthur Brothers Company, for work on the extension of the Charleston, Clendennin & Sutton Railroad in West Virginia, from Otter & Sutton.

The Hazard Powder Company, and Phoenix Powder Mfg. Company:—

June 26th. To make a special price of $1.20 per keg, in carloads, f.o.b. St. Louis, Mo., and $1.45 per 8541
keg, in carloads f.o.b. Choctaw City, O. T. to Mayey Brothers on the Oklahoma & Texas extension of the M. K. & T. R. R. from Oklahoma City to Coalgate, I. T.

To make a special price of $1.20 per keg, in carloads, f.o.b. St. Louis, Mo., and $1.35 per keg, in carloads, f.o.b. points in Arkansas, to J. W. Maney on the construction of the Midland Valley Railroad from Greenwood to Hartford, Ark., and from Greenwood, Ark., to Bokosha, I. T.

June 26th. To make a special price of $1.20 per keg, in carloads, f.o.b., St. Louis, Mo., and $1.35 per keg, in carloads, f.o.b. points in Arkansas, to

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Maney Brothers on the construction of the Midland Valley Railroad, from Greenwood, Ark., to Hartford, Ark., and from Greenwood, Ark., to Bokosha, I. T.

The Ohio Powder Company, Laflin & Rand Powder Company, and E. I. du Pont de Nemours & Company:—

June 8th, 1903. Ohio to make a special price of $1.20 per keg, in carloads, to the McCabe Construction Company for work on the Baltimore & Ohio Railroad, between Bridgeport and Fairpont, Ohio,
8543 and the L. & R. and du Pont Companies to make the same price, through the Wilmington High Explosives Companies to this concern.

American Powder Mills and Phoenix Powder Mfg. Company:—

June 8th. To make a special price of $1.20 per keg, in carloads, f.o.b. St. Louis, Mo., and $1.30 per keg, in carloads, delivered at railroad points in Missouri, to Stubbs, Flick & Johnson on the extension of the C. B. & Q. R. R. from old Monroe, Mo., to Mexico, Mo.

Miami Powder Company, Chattanooga Powder Company, The Hazard Powder Company, Laflin &
8544 Rand Powder Company, and E. I. du Pont de Nemours & Company:—

June 8th. To make a special price of $1.35 per keg, in carloads, to the Brushy Mountain Coal Mines, Petros, Tenn.

Oriental Powder Mills, Laflin & Rand Powder Company, and E. I. du Pont de Nemours & Company:

June 5th. Oriental to make a special price of $1.10 per keg, in carloads, to Bennett & Bennett on railroad work near Uniontown, Pa., and the E. & R. and du Pont Companies to make the same price to this concern on this work, through the Wilmington High Explosives Companies.

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June 24th. Oriental to make a special price of $1.10 per keg in carloads, to Douglass Brothers, on three miles of work on a branch of the B. & O. R. R. between Phillippi and Buchhannon, W. Va., and L. & R. and du Pont Companies to make the same price to them onthis work, through the Wilmington High Explosives Companies.

Laflin & Rand Powder Company and E. I. du Pont de Nemours & Company:

June 8th. To make a special price of $1.20 per keg in carloads, through the Wilmington High Explosives Companies, to Allen & Kefauver on about forty miles of work on the C. L. & W. Division of the B. & O. R. R., between Fairpont and Lafferty, Ohio.

8546

June 20th. To make a special price of $1.20 per keg, in carloads, delivered at Katonah, N. Y., through the Wilmington High Explosives Companies, to William Flanagan, contractor.

To make a special price of $1.10 per keg, in carloads, through the Wilmington High Explosives Companies, to the McArthur Brothers Company, for delivery at Curwensville and Mahaffey, Pa., on sixteen miles of work on the N. Y. C. & H. R. R., between Curwensville and Bower, Clearfield County, Pa.

8547

June 29, 1903. To make a special price of $1.10 per keg, in carloads, through the Wilmington High Explosives Companies, to the Smith Construction Company, on work on the Middle Division of the Pennsylvania Railroad at Granville and Newtwo-Hamilton, Pa.

To make a special price of $1.10 per keg, in carloads, through the Wilmington High Explosives Companies, to T. A. Gillespie & Company, delivered at Sheridan, Pa., for work on the P. C. C. & St. L. R. R. at Carnegie, Pa.

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Austin Powder Company and E. I. du Pont de Nemours & Company:—

June 24th. To make a joint contract with the United States Gypsum Company (, Illinois, for three years, allowing rebate of 10c. per keg, from the schedule carload price, with equity to the Laflin & R. Hazard and Oriental Companies.

Austin Powder Company, Laflin & Rand Powder Company and E. I. du Pont de Nemours & Company:—

June 29th. To make a special price of $1.10 per
8549 keg, in carloads, to the Dull Mercantile Company, Meyersdale, Pa., operating the company stores of the Sommerset Coal Co., for delivery at Meyersdale, Wilson Creek, Landstreet, Athouse, Boynton, Elk Lick, Pine Hill, Pa., and Blaine, W. Va.

Chatanooga Powder Company, The Hazard Powder Company, American Powder Mills, and Laflin & Rand Powder Company:

June 26th. To make a special price of $1.45 per keg, in carloads, to John P. Hughes on ballast work with the Texas & Pittsburg Railroad at Brazos, Texas.

Austin Powder Company, Indiana Powder Com-
8550 pany and Phoenix Powder Mfg. Company:—

June 25th. To make a special price of $1.20 per keg, in carloads, f.o.b. St. Louis, Mo., and $1.35 per keg, delivered in Arkansas, in carloads, to Eby & Stocker for work on the construction of the Midland Valley Railroad, from Greenwood, Ark., to Hartford, Ark., and from Greenwood, Ark., to Bokosha, I. T.

General:—

June 6th, 1903. Taking effect June 8, 1903, the price of "B" blasting powder in carloads of 400 kegs, in Pennsylvania and in the Counties of Garrett, Allegheny and Washington, Md., be $1.25 per keg; that the price of "B" blasting powder in less

than carloads in that territory be $1.40 per keg, f.o.b. Distributing or Mill Points; that the price in less than carloads to jobbers at Pittsburgh, Pa., be $1.30 per keg; that all special prices in Pennsylvania and West Virginia, north of and including the lines of the B. & O. R. R. from Parkersburg to Harpers Ferry, be withdrawn, and that special prices in Pennsylvania, West Virginia, north of and including the lines of the B. & O. R. R. from Parkersburg to Harpers Ferry, and in the Counties of Garrett, Allegheny and Washington, Md., may be recommended by the Special Committee or the Advisory Committee upon application, as follows:

To Dealers: 10c. per keg less than schedule; not to be used for the extension of business, but only to cover trade which they have formerly held.

To Mining Companies: Consuming 2,500 to 5,000 kegs, 5c. per keg less than schedule.

To Mining Companies: Consuming 5,000 to 10,000 kegs, 10c. less than schedul.

To Mining Companies: Consuming over 10,000, 15c. per keg less than schedule.

To Railroad Contractors: 10c. per keg less than schedule.

June 11th. The withdrawal of the previous schedule carload prices for "B" blasting powder in the "Neutral Belt" and the substitution of those as follows:

Colorado: Alamosa, $1.91; Aspen, $2.03; Boulder, $1.61; Baldwin, $2.00; Castle Rock, $1.67; Colorado Springs, $1.61; Cuchara Junction, $1.67; Coal Creek, $1.71; Colorado City, $1.68; Canon City, $1.72; Crested Butte, $2.00; Como, $1.85; Cardiff, $2.02; Central ity, $1.74; Denver, $1.61; Del Norte, $1.95; Dutango, $2.05; Erie, $1.65; Fort ollins, $1.67; Florence, $1.71; Grand Junction, $1.61; Gunnisonfi $1.93; Glenwood Springs, $2.02; Golden,

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$1.64; Hastings, $1.66; Lafayette, $1.67; Longmont, $1.67; Louisville, $1.67; Leadville, $1.89; Meeker, $2.03; Pueblo, $1.61; Rouse, $1.67; Rockdale, $1.71; Rifle, $2.03; Sopris, $1.63; Salida, $1.78; Trinidad, $1.61; Villa Grive, $1.86; Walsenburg, $1.61.

Montana: Boulder, $1.89; Butte City, $1.89; Benton, $1.95; Billings, $1.95; Belt, $1.96; Bozeman, $1.91; Cinnabar, $1.98; Columbia Falls, $1.85; Deer Lodge, $1.89; Great Falls, $1.89; Havre, $1.95; Horr, $1.98; Helena, $1.89; Harlowton, $1.89; Kalispell, $1.85; Livingston, $1.94; Missoula, $1.89;
8555 Neihart, $2.00; Red Lodge, $2.00; Sand Coulee, $1.93; Stockett, $1.94.

New Mexico: Albuquerque, $1.79; Blossburg, $1.64; Belen, $1.79; Cerillos, $1.87; Deming, $1.78; Dawsonfi $1.81; French, $1.69; Gallup, $1.79; Lamy Junction, $1.87; Las Vegas, $1.87; Monero, $1.99; Nutt Station, $1.77; North Capitan, $1.80; Raton, $1.63; Socorro, $1.79; Silver City, $1.79; Torrance, $1.86.

South Dakota: Rapid City, $1.87.

June 11th, 1903—Utah: Coalville, $1.67; Grass Creek, $1.67; Ogden, $1.67; Park City, $1.67; Salt Lake City, $1.67.

8556 Wyoming: Almy, $1.77; Cambria, $1.79; Cheyenne, $1.67; Carbon, $1.87; Cokeville, $1.01; Douglas, $1.83; Evanston, $1.78; Fossil, $1.91; Fort Steele, $1.90; Laramie, $1.80; New Castle, $1.79; Rawlins, $1.92; Rock Springs, $1.94; Sheridan, $1.92.

E. I. du Pont de Nemours & Company:—

July 3d. To make a contract with the New Ohio Washed Coal Company, Carterville and Lander, Ill., at $1.35 per keg, allowing rebate of 17½c. per keg, with equity to the Laflin & Rand, Equitable and Phoenix Companies.

To make a contract with the New Virginia Coal

8557

Company, Johnson City, Ill., at $1.35 per keg, allowing rebate of 15c. per keg.

To make a contract at $1.35 per keg with S. H. Wulfman Coal Company, delivered at Hartwell and Cabel, Ind., allowing rebate of 15c. per keg

To make a contract with the Wheatcroft Coal & Mining Company, Wheatcroft, Ky., at $1.40 per keg, allowing rebate of 10c. per keg.

July 7th. To make a contract with the Missouri & Illinois Coal Company at $1.35 per keg, in carloads, allowing rebate of 17½c. per keg, delivered at Freeburg, Rentchler and Wilderman, Ill., with equity to the Laflin & Rand, Equitable and Phoenix Company.

8558

To make a contract with the Ohio Valley Coal & Mining Company, DeKoven, Ky., at $1.30 per keg, allowing rebate of 10c. per keg.

To make a special price of $1.20 per keg, in carloads, to P. Conner, Receiver of W. H. Blight, Bernice, Pa.

To make a special price of $1.20 per keg, in carloads, delivered at Ralston, Pa., to the Red Run Coal Company.

July 10, 1903. To make a special price of $1.10 per keg, in carloads, to Booth & Flynn, for delivery at Baker Station and Blairsville, Pa., and $1.25 per keg, in less than carloads, delivered in the vicinity of Pittsburgh, Pa.

8559

July 16th, 1903. To make a special price of $1.20 per keg, in carloads, to J. H. Steell & Company, Crenshaw, Pa., covering operations at Dagus Mines, Pa., and also Steel & Company, Crenshaw, Pa.; R. W. Beadle & Company, Brockwayville, Pa.; Penfield Store Company, Penfield, Pa.

July 14th. To renew its contract with the Ottomarmet Coal Mining Company, Raymond City, W. Va., successor to the Marmet-Smith Coal & Mining Company, at $1.35 per keg, allowing a rebate of 10c. per keg.

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July 17th. To make a special price of $1.35 per keg, in carloads, to J. E. Watson, Rich Hill, Mo.

To cancel its present contract and make a new one with the Manufacturers' Coal & Coke Company at $1.45 per keg, allowing rebate of 17½c. per keg, delivered at Novinger, Connellsville and Ninevah, Mo.

Laflin & Rand Powder Company:

July 1st. To make a contract with the Huntington Coal Company, Six Mile Run, Pa., at $1.25 per keg, allowing rebate of 5c. per keg, with the under-
8561 standing that if purchases during the year amount to 5,000 kegs the rebate may be 10c. per keg on all purchases.

July 2d. To make a special price of $1.15 per keg, in carloads, to McConnell & Luker, Kittanning, Pa., for delivery there, and also to the Mosgrove Coal Works, Mosgrove, Pa., and the Logansport Coal Company, Logansport, Pa.

To make a special price of $1.15 per keg, in carloads, to Graham, Herd & Company for delivery at Philipsburg, Pa.

To make a special price of $1.15 per keg, in carloads, to the Central Supply Company, for delivery
8562 at Patton, Hastings and Spangler, Pa.

To make a special price of $1.15 per keg, in carloads, to the J. H. Turnbach Hardware Company, Philipsburg, Pa., for delivery there only.

July 3d. To make a contract with J. King McLanahan, covering the Juniata Limestone Company, Blair Limestone Company, American Lime & Stone Company, St. Clair Limestone Company, at Carlim, Blair Four, Franklin Forge, Flowing Springs, Frankstown, Bellefonte, Union Furnace and Tyrone, Pa., and the Cambria Steel Company, at Naginey, Pa., at $1.25 per keg, allowing rebate of 15c. per keg.

July 10, 1903. To make a special price of $1.20

per keg, in carloads, to Barnes & Tucker, Barnesboro, Pa.

July 17th. To make a special price of $1.20 per keg, in carloads, to the Buffalo & Susquehanna Coal & Coke Company, delivered at Tyler, Du Bois and Sykesville, Pa.

To make a special price of $1.20 per keg, in carloads, to the Morrisdale Supply Company for the Morrisdale Coal Company, Philipsburg, Pa.

Sycamore Powder Mills:—

July 20th. To include the Victoria Coal Company, near Madisonville, Ky., under its contract 8564
with the St. Bernard Mining Company, Earlington, Ky.

The Ohio Powder Company:—

July 1st. To make a special price of $1.10 per keg in carloads, to the Federal Supply Company and the Pittsburg Coal Company in the Pittsburg District.

July 10th. To make a special price of $1.15 per keg in carloads, to the Vesta Coal Company, delivered at Allenport, Bells Vernon, Coal Centre and California, Pa.

The Hazard Powder Company:

July 14th. To make a contract with the West 8565
Jellico Coal Company, Strunks, Ky., at $1.45 per keg, allowing rebate of 10c. per keg.

July 21st. To include under its contract with the Central Coal Company, Fire Creek, W. Va., the Gordon Coal & Coke Company, covering its properties at Morris Creek, Fire Creek and Eagle, W. Va.

The King Mercantile Company:—

July 1st. To renew its contract with the Jones Coal Company, Jackson, Ohio, at $1.35 per keg, allowing rebate of 15c. per keg.

To renew its contract with the Wellston Coal

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Company, Wellston, Ohio, at $1.35 per keg, allowing rebate of 17½c per keg.

July 8th. To make a special price of $1.20 per keg, in carloads, to the Gordon Coal & Coke Company, Montgomery, W. Va., covering the St. Clair Coal Company and the Divis-Gordon Company.

July 17th. To include the McGhee Coal Company, Wellston, Ohio, under its contract with the Comet Coal Company, Dayton, Ohio.

July 20th. To renew its contract with the Emma Coal Company, Edwin Jones, President, Jackson,
8567 Ohio, covering: Emma Mines Nos. 1, 2 and 3, Glenroy, Ohio; Buckeye Coal Company, Coalton, Ohio; Globe Iron Company, Jackson, Ohio; Cornelia Mining Company, Jackson, Ohio; at $1.35 per keg, allowing rebate of 17½c per keg.

Oriental Powder Mills:—

July 1st, 1903. To renew its contract with William Ratican, Furmans, Ill., at $1.35 per keg, allowing rebate of 10c per keg.

To renew its contract with D. Zihlsdorf, Marissa, Ill., at $1.35 per keg, allowing rebate of 15c. per keg.

To renew its contract with the Kolb Coal Com-
8568 pany, Mascoutah, Ill., at $1.35 per keg, allowing rebate of 15c per keg.

To renew its contract with the Greenwood-Davis Coal Company, Duquoin, Ill., at $1.35 per keg, allowing rebate of 15c per keg.

July 7th. To extend to the Morgantown & Kingwood Railroad Company at Morgantown, W. Va., the special price of $1.15 per keg, in carloads, heretofore recommended to be made by this company to the West Virginia Coal Co.

July 3rd. To make a contract with J. King McLanahan, covering the Cambria Steel Company, at Naginey, Pa., at $1.25 per keg, allowing rebate of 15c per keg.

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July 14th. To include the Duncan Run Coal Mining Company, office at Detroit, Mich., mines at Sealover, Ohio, under its contract with W. H. Blaney.

Indiana Powder Company:—

July 1st. To make a special price of $1.10 per keg, in carloads, including one carload shipped January 27th, 1903, to the Midland Coal Company, Dugger, Ind.

July 17th. To make a contract with the Collins Coal Company, Brazil, Ind., at $1.35 per keg, allowing rebate of 15c per keg.

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The Phoenix Powder Mfg. Company:—

July 10th. To make a special price of $1.20 per keg, in carloads, to the St. Louis & O'Fallon Coal Company, Belleville, Ill.

July 14th. To make a special price of $1.20 per keg, in carloads, f.o.b St. Louis, Mo., to the Sligo Furnace Company, on the construction of a line at Sligo, Mo.

To renew its contract with Sholl Brothers, Peoria, Ill., at $1.35 per keg, allowing rebate of 15c per keg, with equity to du Pont and Laflin & Rand Companies.

July 17th. To renew its contract with the Pittsburgh & Midway Coal Mining Company, Midway, Kansas, covering its mines in Kansas at $1.45 per keg, allowing rebate of 20c per keg.

8571

To renew its contract with Applegate & Lewis, Cuba, Ill., at $1.35 per keg, allowing rebate of 15c per keg.

July 21st. To make a special price of $1.20 per keg, in carloads, f.o.b. St. Louis, Mo., to Bates & Schweitzer on the St. Louis, Memphis & Southeastern Railroad.

Austin Powder Company:—

July 3rd, 1903. To make a special price of $1.30 per keg, in carloads, to the Black Diamond Coal & Mining Company, Drakesboro, Ky.

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July 10th. To make a special price of $1.15 per keg, in carloads, to the South Fork Supply Company, South Fork, Pa.

July 17th. To make a special price of $1.20 per keg, in carloads, to the Century Coal & Coke Company, Baltimore, Md.

Austin Powder Company, E. I. du Pont de Nemours & Company and Laflin & Rand Powder Company:—

July 1st. The withdrawal of the special price heretofore recommended to be made by the Laflin
8573 & Rand and du Pont Companies, and Austin direct, to the Miller Supply Company, for delivery at Huntington, W. Va., and Bluefield, W. Va.

July 2nd. Add to the list of points at which delieveries may be made under a special prices of $1.10 per keg, previously recommended for these companies, to the Dull Mercantile Company, the following: Listie, Garrett, Tub Mill Mines, all in Somerset County, Pa.

July 11th. To make a special price of $1.15 per keg, in carloads, to the Vulcan Trading Company for the Harbison-Walker Refractories Company, in Pennsylvania.

8574 Austin Powder Company, Oriental Powder Mills, Laflin & Rand Powder Company, and E. I. du Pont de Nemours & Company:—

July 17th. To make a special price of $1.20 per keg, in carloads, to the Victoria Supply Company, Victoria Mines, Pa.

American Powder Mills, Laflin & Rand Powder Company, and E. I. du Pont de Nemours & Company:—

July 2nd. The withdrawal of the special price of $1.20 per keg, in carloads, f.o.b. St. Louis, Mo., heretofore recommended to be made by American direct, and du Pont and Laflin & Rand through the Wilmington High Explosives Companies, to J. W.

8575

Creech for work on the C. R. I. & P. R. R. near St. Louis.

Chattanooga Powder Company, and E. I. du Pont de Nemours & Company:—

July 7th. To make a special price of $1.35 per keg, in carloads, to the Douglas Coal & Coke Company, Dunlay, Tenn.

Laflin & Rand Powder Company, and E. I. du Pont de Nemours & Company:—

July 1st. To make, through the Wilmington High Explosives Companies, a special price of $1.10 per keg, in carloads, to McMenamin & Sims, for 8576
work on the Pennsylvania Railroad, between Lilly and Portage, Pa.

July 2d, 1903. To make a special price of $1.15 per keg, in carloads, to the Shawmut Commercial Company, Company Store for coal mines on the Pittsburg, Shawmut & Northern Railroad at Shawmut, Weedville and Byrnedale, Pa.

To make a special price of $1.15 per keg, in carloads, to M. Tucker, agent, Morris Run, and Lawrenceville, Pa.

July 10th. The withdrawal of the special price of $1.05 per keg, in carloads, heretofore recommended to be made through the Wilmington High Explo- 8577
sives Companies, to the Pinkerton Construction Company for work on Section 9, known as the Downington Section of the Parkersburg and Columbia cut off of the Pennsylvania Railroad.

July 11, 1903. To make a special price of $1.20 per keg, in carloads, to E. H. Motter & Company for work on the Deepwater Railway in West Virginia, through the Wilmington High Explosives Companies.

July 17th. To make a special price of $1.10 per keg in carloads, through the Wilmington High Explosives Companies, to Willauer & Company at Rock

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Point, Va., for work on the Pennsylvania Lines west.

July 20th. To make a special price of $1.10 per keg, in carloads, through the Wilmington High Explosives Companies, to the Ferguson Contracting Company, on the Pennsylvania Lines west of Pittsburg, Pa., delivery Beaver Falls and New Brighton, Pa.

Oriental Powder Mills, Laflin & Rand Powder Company, E. I. du Pont de Nemours & Company:—

July 21st. The withdrawal of the special price
8579 of $1.10 per keg, in carloads, previously recommended to be made by Oriental direct, and Laflin & Rand and du Pont Companies through the Wilmington High Explosives Companies, to Douglass Brothers, for three miles of work on a branch of the B. & O. R. R. between Phillippi and Buchannon, W. Va., and that the same companies make a special price of $1.20 per keg, in carloads, to Douglass Brothers on this work.

Oriental Powder Mills and E. I. du Pont de Nemours & Company:—

July 10th. Oriental to make a contract, through its agents, the Arthur Kirk & Son Company, with
8580 the United States Steel Corporation for its supplies of powder in Ohio, W. Va., and Pennsylvania, at $1.10 per keg, in carloads, and $1.25 per keg, in less than carloads, for delivery at points in the State of Pennsylvania; $1.20 per keg in carloads for its mines in West Virginia, and $1.15 per keg, in carloads, for its mines in Ohio, and du Pont to make direct a contract with the United States Steel Corporation at the same prices.

July 20th. To make a special price of $1.20 per keg, in carloads, to the Lafayette Supply Company for delivery at Uniontown and Waltersburg, Pa.

The Hazard Powder Company and The King Mercantile Company:—

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July 11th, 1903. To make a special price of $1.20 per keg, in carloads, to the Echo Coal & Coke Company, Beury, W. Va., each to supply the trade of this Company heretofore held by it.

Austin Powder Company and Oriental Powder Mills:—

July 11th. To make a special price of $1.20 per keg, in carloads, to M. J. McQuade, Freeport, Pa.

Austin Powder Company and Ohio Powder Company:—

July 2d. To make a special price of $1.10 per keg, in carloads, to the Star Supply Company, Star Junction, Pa. 8582

Austin Powder Company and E. I. du Pont de Nemours & Company:—

July 8th, 1903. To make a joint contract with the United States Gypsum Company, Illinois, for three years, allowing rebate of 17½c. per keg from the schedule carload price, with equities to Laflin & Rand and Hazard and Oriental Companies.

The King Mercantile Company, Laflin & Rand Powder Company and E. I. du Pont de Nemours & Company:—

July 17th. King to make a special price of $1.20 per keg, in carloads, to Bondurant & Cooper for work on the Deepwater Railway in West Virginia, and Laflin & Rand and du Pont Companies to make, through the Wilmington High Explosives Companies, the same price to them. 8583

The King Mercantile Company and Laflin & Rand Powder Company:

July 2d. To make a special price of $1.15 per keg, in carloads, to the Swank Hardware Company, Johnstown, Pa., for delivery there only.

Austin Powder Company and Laflin & Rand Powder Company:

July 2d. To make a special price in carloads of 20c. per keg less than the schedule price, to the

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Bolen-Darnell Coal Company of Kansas City, Mo., delivered at Yale, Kansas; Rich Hill, Mo.; Bevier, Mo.; Hartford, Ark.; McAlester, I. T., and Craig, I. T.

The Hazard Powder Company and Austin Powder Company:—

July 6th. To make a special price of $1.35 per keg, in carloads, to the New Diamond Coal Company, Altamont, Ky.

General:—

July 1st. That the schedule carload price for
8585 "B" blasting powder at the points named below be as follows:

July 1st, Pryor, Colo., $1.67 per keg.

July 11th, Cler Creek, Utah, $1.55 per keg.

July 14th, Aguilar, Colo., $1.66 per keg.

July 14th, Rugby, Colo., $1.66 per keg.

July 17th, Terry, South Dakota, $1.78 per keg.

July 17th, Deadwood, South Dakota, $1.75 per keg.

E. I. du Pont Company:—

July 22d, 1903. To make a special price of $1.10 per keg, in carloads, to the Jefferson & Clearfield Coal & Iron Co., for delivery at Reynoldsville,
8586 Rochester, Soldiers Run and Indiana, Pa.

July 28th. To make a special price of $1.15 per keg, in carloads, to T. B. Budinger, Snow Shoe, Pa.

To make a contract with the Central Coal & Mining Company, offices at Kewannee, Ill., and mines at Bryant, Fulton County, Ill., at $1.35 per keg, in carloads, allowing rebate of 10c. per keg.

To make a contract with the Farmington Coal Company, Farmington, Ill., at $1.35 per keg, in carloads, allowing rebate of 10c. per keg.

To make a special price of $1.20 per keg, in carloads, to J. H. Steel & Company, delivered at Toby Mines, Pa., and Belington, W. Va.

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To make a special price of $1.35 per keg, in carloads, to Watson & Pearson, Rich Hill, Mo., successors to J. B. Watson.

To make a contract with the Oskaloosa Coal & Mining Company, of Oskaloosa and Beacon, Iowa, at $1.45 per keg, in carloads, delivered in Iowa, or $1.35 per keg, in carloads, f.o.b. Mississippi River, allowing rebate of 15c. per keg.

July 30th. To renew its contract with the Evansville Coal Mining Company, Evansville, Ind., at $1.35 per keg, allowing rebate of 10c. per keg.

To make a special price of $1.20 per keg, in carloads, to the Chicago, Cincinnati & Louisville Railroad, on work between Cincinnati, Ohio, and Richmond, Ind. 8588

To make a special price of $1.15 per keg, in carloads, to James Mellon for delivery at Glen Campbell and Arcadia, Pa.

To make a special price of $1.15 per keg, in carloads, to the Iroquois Coal Company, Brockwayville, Pa., including the Panther Run Coal Company, Sherwood, Pa.

July 31st. To make a special price of $1.15 per keg in carloads, to A. F. Kelly for delivery at Gazzam, Clearfield County, Pa.

8589

August 6th. To make a special price of $1.32½ in carloads, to the American Smokeless Coal Company, Huntington, Ark., instead of making a contract as heretofore recommended.

To renew its contract with the Muren Coal & Ice Company, New Baden and Belleville, Ill., at $1.35 per keg, allowing rebate of 15c. per keg.

August 8th. To make a contract with Henry Holverscheid & Co., Chicago, Ill., covering the Colfax Company, with mines at Colfax, Ill., at $1.35 per keg, in carloads, allowing rebate of 10c. per keg.

August 10th, 1903. To make a contract with the

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Sunnyside Coal Company, of Chicago, Ill., for delivery at Carterville and Herrin, Ill., at $1.35 per keg, in carloads, allowing rebate of 17½c. per keg, or 20c. per keg provided the purchases of that concern during any one year of the life of the contract amount to 10,000 kegs or more.

August 14th. To make a contract with the Saline Coal Company, Harrisburg, Ill., at $1.35 per keg, allowing rebate of 10c. per keg.

To make a contract with the Union Pacific Coal Company, Omaha, Neb., for one year from May
8591 1st, 1903, at $1.45 per keg, f.o.b. Missouri River, allowing rebate of 15c. per keg.

August 19th. To make a contract with the Glendale Coal & Mining Company, Belleville, Ill., at $1.35 per keg, in carloads, allowing rebate of 10c. per keg.

August 21st. To make a special price of $1.20 per keg for one carload of 800 kegs to the St. Louis & O'Fallon Coal Company, Belleville, Ill.

The Hazard Powder Company:

July 30th. To increase to 15c. per keg the rebate under its contract with the Bicknell Coal Company, Bicknell, Ind.

8592 July 31st. To include the Kanawha Gas Coal Company, Cannelton, W. Va., under its contract with W. R. Johnson, Crescent, W. Va.

To make a special price of $1.30 per keg, in carloads, to the Crane Creek Coal & Coke Company, McComas, W. Va., including one carload of 400 kegs already shipped.

August 6th. To make a special price of $1.25 per keg, in carloads, to the Rutledge & Taylor Company, Trenton, Ill., including the Valley Coal & Mining Company, Birchner, Ill., and the Interstate Coal & Mining Company, Worden, Ill.

August 8th. To make a special price of $1.20 per keg, in carloads, through the Wilmington High Ex-

8593

plosives Companies, to Joseph Fuccy, on work on the B. & O. R. R. between Phillippi and Buckhannon, W. Va.

August 15th: To include delivery at Jasonville, Indiana, under its contract previously recommended to be made with the Island Valley Coal & Mining Company, Linton, Ind.

August 21st . To include the General Merchandise Company of New Cumberland, W. Va., under its contract with the West Virginia Fire Clay Mfg. Company, the former being the Company store for the latter concern.

8594

Birmingham Powder Company:—

August 12th. To renew its contract with the Underwood Coal Company, Altoona, Ala., at $1.45 per keg, allowing rebate of 15c per keg.

Laflin & Rand Powder Company:—

July 23rd, 1903. The withdrawal of the special price of $1.10 per keg, in carloads, heretofore recommended to be made to Kenney Brothers, Long Eddy, N. Y.

The withdrawal of the special price of $1.10 per keg, in carloads, heretofore recommended to be made to Kilpatrick Brothers, Hancock, N. Y.

The withdrawal of the special price of $1.10 per keg, in carloads, heretofore recommended, to be made to Randall Brothers, Hancock, N. Y.

8595

July 28th. To continue until Dec. 16th, 1903, the special price of $1.05 per keg, in carloads, heretofore recommended to be made to the Eureka Supply Company, Penna.

To make a special price of $1.15 per keg, in carloads, to the Wrigley Hardware Company, Mahaffey, Pa.

To make a special price of $1.15 per keg, in carloads, to Kelly & Company, Snow Shoe, Pa.

The withdrawal of the special price of $1.05 per keg, in carloads, heretofore recommended to be

8596 made to C. W. Maxwell & Company, Pond Eddy, N. Y.

July 30th. To make a special price of $1.25 per keg, in carloads, to the Gilbert Grocery Company, Portsmouth, O.

To make a special price of $1.20 per keg in carloads, to the Central Coal Company, Hickory, Ia.

The withdrawal of the special price of $1.10 per keg, in carloads, heretofore recommended to be made to Swinton & Company, Port Jervis, N. Y., and to make a special price of $1.25 per keg, in car-

8597 loads, to them.

To make a special price of $1.15 per keg, in carloads, to Mrs. Victor Pezzoni, Monongahela City, Pa.

July 31st. To make a special price of $1.35 per keg, in carloads, f.o.b. St. Paul, Minn., to the Consolidated Coal Company, of Lehigh and New Salem, N. D.

August 1st. To make a special price of $1.15 per keg, in carloads, to Graham, Herd — Company, Philipsburg, Pa., for the trade at schedule price of $1.25 per keg, in carloads, of the following named concerns: Betz Coal Mining Co., Madera, Pa.; W.

8598 A. Gould & Bros., Brisben, Pa.; Joseph Wharton, Graceton, Pa.; Bellefonte Lime Co., Colona, Pa.; Bennett Branch Supply Co., Dents Run, Pa.; W. B. Hughes, Clearfield, Pa.

August 6th. That a special price of $1.15 per keg, in carloads, heretofore recommended to be made to the Swank Hdw. Company for delivery at several points in Pennsylvania, be also for the trade of the Swank Hdw. Co. with the several concerns named below; such trade, however, to be sold at not less than the schedule carload price: Enterprise Supply Company, Garrett, Pa.; Middle Creek Supply Co., Casselman, Pa. (the latter being the same as the Southern Coal Company and the Middle

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Bear Rock Coal Co., Lilly, Pa.

Nanty-Glo Coal Mining Co., Nanty-Glo, Pa.

August 6th, 1903. To make a contract with the Miller Brothers & Company, Mulberry, Kansas, at $1.45 per keg in carloads, allowing rebate of 15c. per keg.

To increase to 20c. per keg the rebate under its contract with the Smith-Lowe Coal Company, Des Moines, Iowa, provided the purchases of that concern during a year amount to 10,000 kegs, the increased rebate to apply on all purchases during that year.

8600

To make a special price of $1.35 per keg in carloads to the Prussia Hdw. Company, Fort Dodge, Iowa.

August 7th. To make a contract with the White Walnut Coal Company, Pickneyville, Ill., at $1.35 per keg in carloads, allowing rebate of 17½c. per keg.

August 14th. To make a contract with W. A. Wells & Company, Buxton and Muchakinock, Iowa, at $1.15 per keg, f.o.b. Mississippi River.

August 19th. To make a contract with the Eureka Deep Vein Coal Company, at $1.35 per keg, in carloads, delivered at Cherokee, Kansas, with an allowance of 5c. per keg for each empty keg returned in good serviceable condition.

8601

To make a contract with the Smoky Hollow Coal Company, Avery, Iowa, at $1.35 per keg, in carloads, delivered, or $1.25 per keg in carloads f.o.b. Mississippi River, allowing rebate of 15c. per keg until Oct. 2d, 1903, and from that date at $1.45 per keg in carloads delivered or $1.35 per keg in carloads f.o.b. Mississippi River, allowing rebate of 22½c. per keg.

Marcellus Powder Company:

July 29th. The withdrawal of the special price of $1.05 per keg, in carloads, heretofore recom-

8602 mended to be made through the Wilmington High Explosives Companies, to the Ferguson Construction Company on the West Side Belt Line near Pittsburg, Pa.

Miami Powder Company:—

July 31st. To make a special price of $1.25 per keg in carloads to W. J. Boone, Grape Creek, Ill.

August 5th. To make a special price of $1.25 per keg in carloads, to the McCrea & Brown Company, Brazil, Ind.

8603 To make a contract with the Tom Corwin Coal Company covering its mines at Coalton, Ohio, at $1.35 per keg, in carloads, and including the Weyanoke Coal & Coke Company, at Giatto, Mercer County, W. Va., at $1.40 per keg, allowing rebate of 15c. per keg, or 17½c. per keg in case the consumption during the year of these concerns, together with that of the Machine Coal Company, at Wellston, Ohio, amounts to 5,000 kegs; The King Mer. Company to have an equity of 25% in the trade at Giatto.

American Powder Mills:—

8604 July 27th, 1903. To make a contract with the Sheridan Coal Company covering its mines in Wyoming, and also near Fuller, Kansas, and Danford, Mo., allowing rebate of 17½c. per keg from the schedule carload price at the respective points of delivery, with the understanding that if the consumption of this concern amounts during a year to a sufficient quantity to take an increased rebate, as provided by the schedule, such increased rebate to be applied on all sales made during the year.

Oriental Powder Mills:—

July 27. To make a special price of $1.20 per keg in carloads to Taylor, McCoy & Company, Gallitzen, Pa., covering the Glenwhite Coal & Lumber Company.

To make a special price of $1.20 per keg in car-

8605

loads to Joseph Smith, Hickman, Pa.

To make a special price of $1.20 per keg, in carloads, to the Punxsutawney Hardware Company, Punxsutawney, Pa.

To make a special price of $1.20 per keg, in carloads, to the Industrial Supply Company, Buena Vista, Pa.

July 27th. To continue during the year 1903 the special price of $1.05 per keg in carloads, heretofore recommended to be made to Patton & Gibson, Stewart Station, Pa.

8606

To make a special price of $1.15 per keg in carloads to the Jamison Supply Company, Hannistown, Pa.

To make a special price of $1.10 per keg, in carloads, to the Penn Traffic Company, of Johnstown, Pa., covering the Cambria Steel Company.

July 30th. To make a special price of $1.10 per keg in carloads to E. C. Lauer for work on the Buffalo, Rochester & Pittsburg Railroad between Stanley and Punxsutawney, Pa.

To make a special price of $1.20 per keg in carloads to F. O. Keister & Company, Waltersburg, Pa., the Company Store of the Keister Coal Company.

8607

July 31st. To make a special price of $1.15 per keg, in carloads, to F. W. Prothero, Du Bois, Pa.

August 3d. To make a special price of $1.15 per keg, in carloads, to George H. Baird, Bridgeville, Pa.

August 7th. To make a special price of $1.15 per keg in carloads, to Hall & Kaul Company, St. Marys, Pa.

August 8th. To make a special price of $1.20 per keg, in carloads, to the Glenwood Coal Company, Glen Campbell, Pa., and the Cymbria Coal Company, Cymbria Mines, Pa.

To make a special price of $1.20 per keg in carloads to the Reynoldsville Hdw. Company, Reynoldsville, Pa.

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8608 To make a special price of $1.20 per keg, in carloads, to John Lloyd, Kittanning Point, Pa., covering the Henrietta Supply Company and the Dunlo Supply Co.

August 10th, 1903. To make a special price of $1.20 per keg, in carloads, to the Fairmont Store Company, Fairmont City, and New Bethlehem, Pa., including the Madison Supply Company, Madison, Pa., and the Headstrom Coal Mining Company, Monterey, Pa.

To make a special price of $1.15 per keg, in carloads, to W. J. Elliott, Cannonsburg, Pa.

8609 To make a special price of $1.20 per keg in carloads to the Clyde Supply Company, Fredericktown, Pa., the company store for the Clyde Coal Company.

To make a special price of $1.20 per keg, in carloads, to the Claridge Supply Company, Claridge, Pa.

August 11th. To make a special price of $1.20 per keg, in carloads, to the Edna Supply Company, Edna, Pa., the Company Store for the Pittsburg & Baltimore Coal Company, with offices at Pittsburg, Pa.

8610 The King Mercantile Company:—

July 24th. To renew its contract with the Ashland Iron & Mining Company, Ashland, Ky., at $1.35 per keg, allowing rebate of 15c. per keg.

July 30th. To make a special price of $1.10 per keg, in carloads, through the Wilmington High Explosives Companies, to Boxley & Gibson, successors to J. J. Boxley & Son, for work on the Norfolk & Western Railroad near Radford, Va.

August 8th. To make a special price of $1.20 per keg, in carloads, to the Carbon Coal Company, Leewood, W. Va., including the United Coal Company, Leewood, W. Va., and the Republic Coal Company, Coalburg, W. Va.

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August 11th. To make a contract with the Armstrong Coal Company, Jackson, Ohio, including the Gallia Mining Company, of Jackson, Ohio, with mines at Hawk Station, Ohio, at $1.35 per keg, allowing rebate of 10c. per keg.

August 5th. To make a contract with the Machine Coal Company, Wellston, Ohio, at $1.35 per keg, in carloads, allowing rebate of 15c. per keg, or 17½c. per keg in case the consumption during the year of this concern, together with that of the Tom Corwin Coal Company, at Coalton, Ohio, and including the Weyanoke Coal & Coke Company, at Giatto, W. Va., amounts to 5,000 kegs. 8612

Austin Powder Company:

July 27th. To make a special price of $1.20 per keg, in carloads, to the Merchants Coal Company, Merchants Mines, Pa., including the Elk Lick Supply Company, Merchants Mines, Pa., Tunnelton Supply Company, W. Va., and Quemahoning Supply Company, Boswell, Pa.

To make a special price of $1.20 per keg, in carloads, to the Maryland Smokeless Coal Company, Belington, W. Va.

July 27th, 1903. To make a special price of 5c. per keg less than the schedule carload price at the respective points of delivery to the Douglas Company, Douglas, W. Va., the Company Store for the Cumberland Coal Company, including the West End Supply Company, West End, W. Va. 8613

August 17th. To make a special price of $1.20 per keg in carloads, to the Mack Manufacturing Company, New Cumberland, W. Va.

The Ohio Powder Company:

July 31st. To make a special price of $1.30 per keg in carloads, to the Grand Rapids Plaster Company, Grand Rapids, Mich.

August 17th. To make a special price of $1.25

8614 per keg, in carloads, to the Nelsonville Sewer Pipe Company, Nelsonville, Ohio.

To make a special price of $1.17½ per keg, in carloads, to the Miners' Supply Company, covering the Chicago-Vermillion Coal Company, with mines at Streator and Springfield, Ill.

August 20th. To renew its contract with the Kanawha & Coal River Coal Company, Charleston, W. Va., at $1.35 per keg, allowing rebate of 10c. per keg.

The Phoenix Powder Mfg. Company:—

8615 July 24th. To renew its contract with the Western Anthracite Coal & Coke Company, St. Louis, Mo., mines at Belleville and Sparta, Ill., at $1.35 per keg, allowing rebate of 17½c. per keg.

July 27th. To renew its contract with the Carterville Coal Company, Carterville, Ill., at $1.35 per keg, allowing rebate of 15c. per keg, with the understanding that should the purchases amount to a sufficient quantity to warrant an increased rebate under the schedule, such rebate may be applied on purchases made during the year.

August 6th. To make a special price of $1.20 per keg, in carloads, f.o.b. St. Louis, Mo., and $1.45

8616 per keg, in carloads, f.o.b. Earlsboro, O. T., through the Wilmington High Explosives Companies, to Shipley & Outzen, for work on the Oklahoma & Texas Railroad, from Oklahoma City to Coalgate, I. T.

To make a special price of $1.40 per keg in carloads to A. J. Lopp & Company, Harrison, Ark.

August 6th. To renew its contract with the Germantown Coal & Mining Company, Germantown, Ill., at $1.35 per keg, allowing rebate of 15c. per keg, with equity to the L. & R. Company; such to be considered as quid pro quo for a part of the Peoria business.

August 21st. To allow to the Madison Coal Com-

pany, St. Louis, Mo., a rebate of 15c. per keg from the schedule carload price of $1.25 per keg on powder sold to that concern between July and December, 1902, and 25c. per keg from December, 1902, until the expiration of the contract which the Equitable Powder Mfg. Company has with the Madison Coal Company, Illinois.

Indiana Powder Company:—

July 28th, 1903. To include O'Gara, King & Company for delivery at Janesville and Lyford, Indiana, under its contract with the Summit Coal & Mining Company, Bloomfield, Ind.

8618

August 11th. To make a special price of $1.10 per keg, in carloads, to the Jackson Hill Coal & Coke Company, at Seelyville, Ind., formerly operated as the Lost Creek Coal Company, and for delivery near Sullivan, Ind.

August 14th. To make a special price of $1.10 per keg, in carloads, to the Letsinger Coal Company, Bloomfield, Ind.

August 17th. To make a special price of $1.20 per keg, in carloads, to the North Jackson Coal & Mining Company, at Chicago, Ill., with mines at Hymera, Ind.

E. I. du Pont Company and Laflin & Rand Powder Company:—

8619

July 23d. To make a special price of $1.20 per keg, in carloads, through the Wilmington High Explosives Companies, to the Victoria Supply Company, Victoria Mines, Pa.

July 28th. To make a special price of $1.10 per keg, in carloads, through the Wilmington High Expplosives Companies, to the Pittsburg Construction Company, delivered at Leasdale, Pa., for work on the Pennsylvania Railroad west of Pittsburgh.

July 29th. To make a contract with the Smoky Hollow Coal Co., Avery, Iowa, at $1.35 per keg, in carloads, allowing rebate of 15c. per keg until Octo-

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ber 2d, 1903, and from that date at $1.45 per keg, in carloads, allowing rebate of 22½c. per keg.

To make a special price of $1.10 per keg in carloads, through the Wilmington High Explosives Companies, to the Ferguson Contracting Company, for work on the Wabash Railroad near Pittsburgh, Pa.

To make a special price of $1.10 per keg, in carloads, through the Wilmington High Explosives Companies, to Frank Greco, for work on the Buffalo & Susquehanna Railroad, near Benezett and Drift-

8621 wood, Pa.

July 30th. To make a special price of $1.25 per keg, in carloads, through the Wilmington High Explosives Companies, to Eliason & Rhodes, for work on the Norfolk & Western Railroad at Naugatuck, W. Va.

July 31st. To make a special price of $1.30 per keg, in carloads, through the Wilmington High Explosives Companies, to W. J. Oliver & Company, on work on the Southern Railway, between Maryville, Tenn., and Walhalla, S. C.

August 3d. To make a contract through the Wilmington High Explosives Companies, with the Big Hill Coal Company, Richmond, Ky., covering its

8622 operations at Orlando, Ky., at $1.45 per keg, allowing rebate of 10c. per keg, if its purchases during the year amount of 1,200 kegs; 15c. per keg if the purchases amount to 2,400 kegs during the year, or a greater rebate according to schedule, if its purchases during the year amount to a sufficient quantity to warrant it.

August 6th, 1903. To make a special price of $1.20 per keg, in carloads, through the Wilmington High Explosives Companies, to D. A. Langhorne, on work on the Deepwater Railway in West Virginia.

August 11th. To make a special price of $1.25

per keg, in carloads, to Garland & Rossi, for work on the Norfolk & Western Railroad, near Gary, W. Va.

August 12th. To make a special price of $1.10 per keg, in carloads, through the Wilmington High Explosives Companies, to Mr. Bart McDonald, for work on the connecting line of the Wabash Railroad between Western Maryland Railroad and West Virginia Central Railroad, from Cherry Run to Cumberland, Md.

August 14th. To make a special price of $1.10 per keg, in carloads, through the Wilmington High 8624
Explosives Companies, to Frank Greco on work on the Susquehanna & Southern Railroad, between Sinnemahoning, Pa., and Wellsville, N. Y., and from Wellsville to Buffalo, N. Y.

August 19th. To make a special price of $1.30 per keg, in carloads, through the Wilmington High Explosives Companies, to W. J. Oliver & Company, on work on the Southern Railway, from Jellico, Tenn., towards Middlesboro, Ky.

August 21st. To make a special price of $1.30 per keg, in carloads, through the Wilmington High Explosives Companies, to W. J. Oliver & Company on work on the Southern Railway, from Oliver 8625
Springs, Tenn.

E. I. du Pont Company, Laflin & Rand Powder Company and The King Mercantile Company:—

August 3d. To make a special price of $1.10 per keg, in carloads, through the Wilmington High Explosives Companies to the Degnon-McLean Construction Company, for work on the connecting line of the Wabash Railroad, between the West Maryland Railroad and the West Virginia Central Railroad, from Cherry Run to Cumberland, Md.

The Hazard Powder Company and The Ohio Powder Company:

August 3d. To make a special price of $1.25

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per keg, in carloads, to Spencer & Hazeltine, New Straitsville, Ohio.

Oriental Powder Mills and Austin Powder Company:—

July 27th. To make a special price of $1.20 per keg, in carloads, to Hammond, Berkey & Company, Bolivar, Pa., the Company Store for the Reese-Hammand Fire Brick Company, and including the Curwensville Fire Brick Company.

E. I. du Pont Company, Laflin & Rand Powder Company, Chattanooga Powder Company and
8627 Miami Powder Company:—

July 28th, 1903. To make a special price of $1.25 per keg, in carloads, to the Callahan Construction Company, for work on the Cumberland Valley Division of the Louisville & Nashville Railroad at Pennington, Va.

E. I. du Pont Company, The King Mercantile Company, Laflin & Rand Powder Company, and Oriental Powder Mills:—

July 31st. To make a special price of $1.25 per keg in less than carloads, through the Wilmington High Explosives Companies, to Rinehart, Dennis & Company, for work on the Baltimore & Ohio Rail-
8628 road at Pittsburgh, Pa.

American Powder Mills, E. I. du Pont Company, The King Mercantile Company and Laflin & Rand Powder Company:—

August 6th. American to make direct, and du Pont L. & R. and King, through the Wilmington High Explosives Companies, a special price of $1.10 per keg, in carloads, to McArthur Brothers, for work on the connecting line of the Wabash Railroad between the Western Maryland Railroad and the West Virginia Central Railroad, from Cherry Run to Cumberland, Md.

E. I. du Pont Company, American Powder Mills, and Laflin & Rand Powder Company:—

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August 8th. Du Pont and L. & R. Companies to make a special price of $1.10 per keg in carloads, through the Wilmington High Explosives Companies, and American to make the same price direct to Kilpatrick Brothers & Collins on work on the connecting line of the Wabash Railroad, between the Western Maryland Railroad and the West Virginia Central Railroad, from Cherry Run to Cumberland, Md.

August 10th. To make American direct, and L. & R. and du Pont through the Wilmington High Explosives Companies, a special price of $1.20 per 8630
keg, in carloads, f.o.b. Mississippi River, to Streeter & Lusk, for work on their contract on the Denver, Northwestern & Pacific Railroad.

E. I. du Pont Company, Austin Powder Company and Laflin & Rand Powder Company:

August 8th. To make Austin direct and L. & R. and du Pont Companies, through the Wilmington High Explosives Companies, a special price of $1.10 per keg in carloads, to the Pittsburgh & Buffalo Coal Company, and the White Rock Supply Company, for delivery at Anderson, Bruce, White Rock, Canonsburg, Burgettstown and Wilson, Pa.

E. I. du Pont Company and Austin Powder Com- 8631
pany:

August 10th, 1903. To make a special price of $1.20 per keg in carloads, to D. Ross & Company, Woodland, Pa.

Oriental Powder Mills and Laflin & Rand Powder Company:—

August 6th. To make a special price of $1.15 per keg, in carloads, to the Central Supply Company, Patton, Pa., for delivery at Patton, Hastings and Spangler, Pa., and for the trade of the Central Supply Company with the several concerns named below; such trade, however, to be sold at not less than the schedule carload price: Cresson & Clearfield

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Coal & Coke Co., Frugality, Pa.; Lackawanna Coal & Coke Co., Wehrum, Pa.; Lackawanna Coal & Coke Co., Vintondale, Pa.; John McNulty & Sons, Coalport, Pa.; Indiana Coal Company, Glen Campbell, Pa.; Indiana Coal Company, Arcadia, Pa.; D. F. Edelblute & Company, Irvona, Pa.; Oakridge Coal & Coke Co., Hastings, Pa.; Bellwood Coal Company, Figart, Pa.; Walnut Coal Company, Spangler, Pa.; S. Hagerty & Sons, Coalport, Pa.; Ake & McAtee, Cush Creek Junction, Pa.; Bakerton Coal Company, Elmora, Pa.; Logan Coal Company, Bun-

8633 lo, Pa.

To make a special price of $1.15 per keg, in carloads, to the Central Trading Company, Clearfield, Pa., for the trade of the Central Trading Company, with the several concerns named below; such trade, however, to be sold at not less than the schedule carload price: Central Trading Company, Mitchells, Pa.; Central Trading Company, Patton, Pa.; Central Trading Company, Rossiter, Pa.; Benedictine Store (R. Peale), Patton, Pa.; Glen Richey Trading Company, Glen Richey, Pa.; Rathmel Supply Company, Rathmel, Pa.; Decatur Store Company, Philipsburg, Pa.; Windburne Trading Company,

8634 Windburne, Pa.; Sonnerville & Company, Windburne, Pa.; Beech Creek Coal & Coke Company, Patton, Pa.; Potts Run Land Company, Boardman, Pa.; Clearfield & Southern Railway, Boardman, Pa.

Oriental Powder Mills and Laflin & Rand Powder Company:

July 27th. To make a special price of $1.20 per keg, in carloads, to Johnson, Beyer & Company, Rural Valley, Pa.

Oriental Powder Mills and The Hazard Powder Company:—

August 1st. To renew their contract with the Low Moor Iron Company of Virginia at $1.35 per [illegible] rebate of 15c. per keg.

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The Hazard Powder Company and The King Mercantile Company:—

July 30th. To make a special price of $1.25 per keg, in carloads, to the Kentucky Block Cannel Coal Company, Cannel City, Ky.

Oriental Powder Mills and E. I. du Pont Company:—

July 23d, 1903. To make special prices to the United States Steel Corporation of $1.10 per keg in carloads, and $1.25 per keg in less than carloads, for delivery at points in Pennsylvania; $1.20 per keg in carloads for its mines in West Virginia, and 8636
$1.15 per keg in carloads for its mines in Ohio.

E. I. du Pont Company, Miami Powder Company, Ohio Powder Company, The King Mercantile Company, Oriental Powder Mills, and Laflin & Rand Powder Company:

August 14th. To make a special price of $1.20 per keg, in carloads, to the Pittsburg Terminal Railroad & Coal Co., Pittsburgh, Pa., with the understanding that the price may be $1.15 per keg in carloads, if the purchases of this concern during the year amounts to as much as 5,000 kegs.

Laflin & Rand Powder Company, Oriental Powder Mills, E. I. du Pont Company:— 8637

August 19th. To make a special price of $1.10 per keg, in carloads, through the Wilmington High Explosives Companies, to H. S. Kerbaugh on work on the Pennsylvania Railroad at Latrobe, Pa.

Austin Powder Company, E. I. du Pont Company, The King Mercantile Company, and Laflin & Rand Powder Company:—

August 21st. The Laflin & Rand, du Pont and Austin Companies to make a special price of $1.15 per keg in carloads, to the Vulcan Trading Company, covering the operations of the Harbison-Walker Refractories Company in Pennsylvania, and the King Co., to make a special price of $1.17½c. per

8638 keg in carloads to the Portsmouth, Harbison-Walker Company at Portsmouth, Ohio, and Ashland, Ky.

E. I. du Pont Company and Laflin & Rand Powder Company:—

August 17th. To make a special price of $1.25 per keg, in carloads, through the Wilmington High Explosives Companies, to McCann & Lebling, at Gary, W. Va.

The E. I. du Pont Company:—

August 25th. To renew its contract with the Chicago & Carterville Coal Company, of Herrin and Carterville, Ill., at $1.35 per keg, in carloads, allow-
8639 ing rebate of 17½c. per keg.

August 24th. To make a contract with James Walker, Mapleton, Ill., at $1.35 per keg, allowing rebate of 10c. per keg.

August 29th. To make a special price of $1.15 per keg, in carloads, to L. McCormick, delivered at Venetia, Monongahela and Anderson Station, Pa.

August 31st, 1903. That a discount of 2% for cash may be permitted to be made without penalty, on bills for sales within any one month, to the Sloss-Sheffield Steel & Iron Company, of Birmingham, Ala., provided remittance for the same be made by the 15th of the following month.

8640 Sept. 1st. To make a contract with P. Grant, Jr., Peoria, Ill., for three years, at $1.35 per keg, in carloads, allowing rebate of 10c. per keg.

To make a special price of $1.15 per keg, in carloads, to J. H. Steell & Company, provided that the purchases off that concern during the year amount to 5,000 kegs.

Sept. 1st. To include the Shelby Iron Company, Shelby, Ala., under its contract with the Alabama Consolidated Coal & Iron Company, Birmingham, Ala.

To make a contract with Vicary Brothers, Peoria, Ill., for three years, at $1.35 per keg, in carloads, allowing rebate of 15c. per keg.

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To make a contract for three years from August 1st, 1903, with the Clark Coal & Coke Company, Peoria, Ill., at $1.35 per keg, in carloads, allowing rebate of 15c. per keg.

To make a contract for three years with S. Wolschlag & Brother, Peoria, Ill., at $1.35 per keg, in carloads, allowing rebate of 17½c. per keg.

To increase to 17½c. per keg, from May 1st, 1903, the rebate under its contract with the Horse Creek Coal Company, Pawnee, Ill.

Sept. 4th. To make a contract with Sholl Brothers, Peoria, Ill., at $1.35 per keg, in carloads, allowing rebate of 17½c. per keg.

8642

To include delivery at Willisville, Ill., under its contract with the Missouri & Illinois Coal Company.

Sept. 4th. To include the Pittsburg & Fairmont Fuel Company, Adamston, W. Va., under its contract with the Fairmont Coal Company.

Laflin & Rand Powder Company:

August 25th. To make a contract with the Central Coal Company, Hickory, Iowa, at $1.20 per keg, in carloads.

August 31st. That a discount of 2% for cash may be permitted to be made by this Company without penalty on bills for sales made by it, within any one month, to the J. B. Crowe Coal & Mining Company, of Kansas City, Mo., provided remittance for the same be made by the 10th of the following month.

8643

Sept. 1st. To make a contract with the Rocky Mountain Fuel Company for delivery at Cardiff Glenwood Springs, Colo., and Florence and Trinidad, Colo., at the schedule carload price delivered there, allowing rebate of 10c. per keg, or 15c. per keg, provided the purchases of this concern amount to 5,000 kegs per year.

Sept. 2d. To make a special price of $1.15 per keg, in carloads, to the Federal Supply Company,

8644 delivered at Willock, Pa., for the Willock Supply Company.

The Hazard Powder Company:—

August 24th, 1903. To make a contract with C. T. Defenbauch, Peoria, Ill., at $1.35 per keg, allowing rebate of 10c. per keg.

To make a contract with C. B. Kramm & Brothers, Edwards Station, Ill., at $1.35 per keg, allowing rebate of 10c. per keg.

August 26th. To renew its contract with the Washington Fuel Company (W. H. Crowder), of Farnsworth, Ind., at $1.35 per keg, allowing rebate
8645 of 10c. per keg.

August 29th. To make a special price of $1.35 per keg, in carloads, to the Star Coal Company, East Bernstadt, Ky.

Sept. 4th. To make a special price of $1.15 per keg, in carloads, to the Cable Mercantile Company, covering the supplies of Cable & Company at Cable and Sherrard, Ill.

Schaghticoke Powder Company:—

August 26th. To make a special price of $1.10 per keg, in carloads, through the Wilmington High Explosives Companies, to the Pinkerton Construction Company, on work on section 9, known as the
8646 Downington Section of the Parkersburg & Columbia cutoff of the Pennsylvania Railroad.

Miami Powder Company:—

August 24th. To make a special price of $1.25 per keg, in carloads, to the Northwest Coal Company, delivered at Jasonville, Ind.

Oriental Powder Mills:—

July 27th. To continue during the year 1903 the special price of $1.05 per keg, in carloads, heretofore recommended to be made to Patton & Gibson, Stewart Station, Pa.

Sept. 4th. To renew its contract with the Great Western Coal & Coke Company, successor to the

8647

Wilberton Coal & Mining Company, for delivery at Wilburton, McAlester, Krebs, I. T., and including the Haileyola Coal Company and the Osage Coal & Mining Company in the same vicinity, at $1.60 per keg, in carloads, allowing rebate of 20c. per keg, and to make a contract with James Degnan & Company for the McAlester Coal & Mineral Company, Eastern Coal & Mining Company, and the Missouri, Kansas & Texas Coal Company, at the same location and at the same price.

The King Mercantile Company:

8648

August 26th. To make a special price of $1.20 per keg, in carloads, through the Wilmington High Explosives Companies, to Mr. Allen Langhorne on work on the Deepwater Railway in West Virginia.

Sept. 1st. To make a special price of $1.20 per keg, in carloads, to the Webster Grocer Company, Danville, Ill., to date from April 1st, 1903.

Sept. 4th. To make a special price of $1.25 per keg, in carloads, to the Leewood Colleries Company and the West Virginia Collieries Company at Leewood, W. Va.

The Phoenix Powder Mfg. Company:—

8649

Sept. 1st. To make a special price of $1.20 per keg, in carloads, f.o.b. East St. Louis, Ill., to W. T. Montgomery on work on the Big Four Railroad in Ohio.

To make a contract with Joseph Taylor, O'Fallon, Ill., at $1.35 per keg, in carloads, allowing rebate of 17½c. per keg.

Chattanooga Powder Company:—

Sept. 1st. That a discount of 2% for cash may be permitted to be made by this Company without penalty on bills for sale made by it, within any one month, to the Stearns Coal Company, near Whitley, Ky., provided remittance for the same be mailed by the 30th of the following month.

Sept. 4th. To make a contract with the Alabama

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& Georgia Iron Company, at Spring Garden, Ala, at $1.45 per keg, allowing rebate of 10c. per keg.

The E. I. du Pont Company and Laflin & Rand Powder Company:—

August 25th. To make a special price of $1.25 per keg, in carloads, through the Wilmington High Explosives Companies, to J. T. McKinney & Company, on work on the N. & W. R. R., from Cephas, W. Va., to near the mouth of Widemouth, on the Blue River.

Sept. 4th. Cancels recommendation of August
8651 3d, 1903, and recommends a contract to be made, through the Wilmington High Explosives Companies, with the Big Hill Coal Co., Richmond, Ky., covering its operations at Orlando, Ky., at $1.45 per keg, allowing rebate of 10c. per keg if its purchases during the year amount to 1,200 kegs; 15c. per keg if the purchases amount to 2,400 kegs during the year, or a greater rebate according to schedule if its purchases during the year amount to a sufficient quantity to warrant it.

The Hazard Powder Company and The E. I. du Pont Company:—

August 26th. To make a special price of $2.00
8652 per keg in less than carloads for "A" blasting powder to the Knickerbocker Lime Company, Norristown, Pa.

The E. I. du Pont Company, The King Mercantile Company, and Laflin & Rand Powder Company:—

August 24th. To make a special price of $1.20 per keg, in carloads, L. & R. and du Pont Companies, through the Wilmington High Explosives Companies, and King direct, to J. A. Caldwell on work on the Deepwater Railway, between Scarboro and Raleigh, W. Va.

Sept. 1st. To make a special price of $1.20 per keg, in carloads, through the Wilmington High Explosives Companies, to Jennings & Ellis, on work

on the Deepwater Railway in West Virginia, between Scarboro and Raleigh, W. Va.

The E. I. du Pont Company, Austin Powder Company, and Laflin & Rand Powder Company:—

Sept. 5th. To make a special price of $1.20 per keg, in carloads, L. & R. and du Pont Companies, through the Wilmington High Explosives Companies, and Austin direct, to the Coal & Coke Railway Company, on work on the Charleston, Clendennin & Sutton Railway, between Elkins and Sutton, W. Va.

Oriental Powder Mills, The E. I. du Pont Company, The King Mercantile Company, Miami Powder Company, The Ohio Powder Company, and Laflin & Rand Powder Company:— 8654

August 25th. To make a special price of $1.10 per keg, in carloads, to the Pittsburg Terminal Railroad & Coal Co., provided the purchases of that concern amount during the year to 10,000 kegs or over.

The E. I. du Pont Company, Indiana Powder Company, American Powder Mills, Phoenix Powder Mfg. Company, and Laflin & Rand Powder Company:—

Sept. 1st. That a special price of $1.20 per keg, 8655
in carloads, be made by L. & R. du Pont and Indiana through the Wilmington High Explosives Companies, and American and Phoenix Companes direct, to Kennefick & Company on work on the Indiana Southern Railroad, between Indianapolis and Sullivan, Ind.

The E. I. du Pont Company:—

Sept. 11th. To make a contract with the Victor Coal Company, Pawnee, Ill., at $1.35 per keg, allowing rebate of 20c. per keg.

Sept. 14th. To make a contract with the Bevier Coal Company, Bevier, Ky., at $1.40 per keg, in carloads, allowing rebate of 10c. per keg.

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To name a contract with the Princess Land & Mining Company, Princess, Ky., with general offices at Ashland, Ky., at $1.40 per keg, in carloads, allowing rebate of 10c. per keg.

Sept. 14th. To make a contract with the Winslow Gas Coal Company, Winslow, Ind., at $1.35 per keg, in carloads, allowing rebate of 10c. per keg.

The Hazard Powder Company:—

Sept. 14th. To include the Wolverine Coal Company, West Bay City, Mich., under its contract with R. M. Dandall, General Manager.

8657 Sept. 15th. To include the Handy Brothers Mining Company, of West Bay City, Mich., under its contract with R. M. Randall, General Manager.

Laflin & Rand Powder Company:

Sept. 14th. To make a contract with the Wear Coal Company for delivery at its mines at Pittsburg, Kansas, Vernon, Mo., and Minden, Mo., including the Godman Coal & Coke Co., Godman, Ark., and the Collinsville Mercantile Company, Collinsville, I. T., the Murlin Fuel Company, Bevier, Mo., and the Wabash Coal Company, Huntsville, Mo., allowing rebate of 27½c. per keg from the schedule carload price at the point of delivery.

8658 That a discount of 2% for cash may be permitted to be made by this Company without penalty, on bills for sales made by it, within any one month, to the Wear Coal Company, provided remittance for the same be mailed by the 10th of the following month.

The Miami Powder Company:—

Sept. 14th. To make a special price of $1.20 per keg, in carloads, to the Pwyton-Palmer Company, Danville, Ill.

Oriental Powder Mills:—

Sept. 14th. To make a special price of $1.15 per keg, in carloads, to A. F. Kelly, Barnesboro, Pa.

The King Mercantile Company:—

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Sept. 11th. To make a special price of $1.20 per keg, in carloads, to the Stevens Coal Company, Acme, W. Va.

Sept. 14th. To extend to the New York Mining Company, Mt. Savage, Md., through the Potomac Hardware Company, of Cumberland, Md., the special price of $1.15 per keg in carloads, heretofore recommended to be made by this Company to the Potomac Hardware Company, and also to include the Union Mining Company, Frotsburg, Md., and the Consolidation Coal Company, Lord, Md., in the trade of the Potomac Hdw. Company; no sales, however, to be made to the last named concerns by the Potomac Hdw. Company in carloads at less than the schedule carload price.

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To make a special price of $1.30 per keg, in carloads, to the Big Four Coal & Coke Company, Bluefield, W. Va.

Austin Powder Company:—

Sept. 12th. To make a special price of $1.20 per keg, in carloads, to the Youghiogheney & Ohio Coal Company, including the Lisbon Coal Company, Lisbon, Ohio, the Big Vein Coal Company, Salineville, Ohio, and the Beaver Dam Coal Company, New Philadelphia, Ohio.

8661

Sept. 14th. To make a special price of $1.20 per keg in carloads to the Phillippi Coal Mining Company, Phillippi, W. Va.

Sept. 14th. To make a special price of $1.20 per keg, in carloads, to the Pittsburg & Eastern Coal Company, with headquarters at Pittsburg, and mines at Monongahela City, Budgettstown, Bulgar, McDonald, Hazel Kirk and Van Boorhis, Pa., successor to McCracken & Company.

To make a special price to Buston & Landstreet Company of $1.15 per keg, in carloads, delivered in West Virginia, south of the main line of the B. & O. R. R., from Parkersburg to Harpers Ferry, and

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$1.10 per keg in carloads delivered in West Virginia on and north of that line.

E. I. du Pont Company:—

Sept. 14th. To make a special price of $0.25 per keg, in lots of 200 kegs, for "A" powder delivered at Port Deposit, Md., to the McClenahan Granite Company:—

The Phoenix Powder Mfg. Company:—

Sept. 14th. To make a special price of $1.20 per keg, in carloads, f.o.b. Chicago, Ill., to Phelan & Shirley, on work on the Chicago, Rock Island &
8663 Pacific Railroad, between Wintersel and Greenfield, Iowa.

Recommends the withdrawal of its previous recommendation of July 27th, 1903, for Phoenix to renew its contract with the Germantown Coal & Mining Company, with equity to the L. & R. P. Company, such to be quid pro quo for a part of the Peoria business, and recommends Phoenix to renew its contract with the Germantown Coal & Mining Company, Germantown, Ill., at $1.35 per keg, in carloads, allowing rebate of 15c. per keg.

Chattanooga Powder Company:—

Sept. 9th. To make a contract with the Stone
8664 Gap Colliery Company, Glamorgan, Va., at $1.40 per keg, in carloads, allowing rebate of 10c. per keg.

Laflin & Rand Powder Company and E. I. du Pont Company:—

Sept. 8th. To make a special price of $1.20 per keg, in carloads, delivered at Polk, Ohio, through the Wilmington High Explosives Companies to Walton & Company for work on section 59 of the Wabash Railroad.

Sept. 11th. To make a special price of $1.05 per keg, in carloads, through the Wilmington High Explosives Companies, to Mason, Rosser & Company on work on the Buffalo & Susquehanna Railroad, between du Bois and Sabula, Pa.

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Sept. 14th. To make a special price of $1.15 per keg, in carloads, through the Wilmington High Explosives Companies, to the Keneweg Company, Cumberland, Md., with the understanding that the powder is for delivery at Cumberland only, and not for reshipment in carload lots from that point.

Sept. 14th. To make a special price of $1.20 per keg, in carloads, through the Wilmington High Explosives Companies, delivered at Kent, Ohio, to Cendelia Brothers on work on the B. & O. R. R. at Ravenna, Ohio.

Laflin & Rand Powder Company and Sycamore Powder Mills:— 8666

Sept. 12th, 1903. To make a special price of $1.35 per keg, in carloads, through the Wilmington High Explosives Companies, to the Howell Mining Company, Blocton, Ala.

E. I. du Pont & Company, The King Mercantile Company, and Laflin & Rand Powder Company:—

Sept. 12th. To make a special price of $1.20 per keg, in carloads, through the Wilmington High Explosives Companies, delivered at Hopedale, Ohio, to P. Moran on work on the Wabash Railroad.

E. I. du Pont & Company, Austin Powder Company, and Laflin & Rand Powder Company:— 8667

Sept. 9th. To make a special price of $1.25 per keg in carloads, delivered at Huntington, W. Va., and $1.30 per keg in carloads delivered at Bluefield, W. Va., du Pont and L. & R. through the Wilmington High Explosives Companies, and Austin direct, to the Miller Supply Company.

E. G.

New York, N. Y., Oct. 1st, 1903.

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No

TRADE THAT 95 PER CENT AUTHORIZATION DID NOT BRING TO US.

St. Louis Portland Cement Co., Rotaca River C. & C. Co,, Southern Indiana Coal Co., David Ingle, Clover Leaf Coal Co., Sunflower Coal Co., White Rose Coal Co., West Indiana Coal Co., Coal Bluff Mng. Co., Keystone Coal Co., Consolidated Ind. C. Co., Bessimer Wash Coal Co., Tilden Coal Co., J. A. Green Co., Union Coal Co., Glendora Mine Co., Jasonville Coal Co., Lewis C. & M. Co.,
8669 McClellan Sons & Co., Maple Valley Coal Co., Miami Coal Co., Rock Run Coal Co., Linton Mitum. Coal Co., Seeleyville C. & M. Co., Linchall Vien C. & M. Co., Raccoon Valley Mng. Co., Greenfield C. & M. Co., Asherville Mng. Co., Park County Coal Co., Edwardsville Coal Co., Domestic Coal Co., Freeman Coal Co., Big Vein Mng. Co., Kansas City So. Ry., Crawford Coal Co., Columbus B. K. and T. C. Co., Prebles Paving Brick Co., The Lum Coal Co., McRoy Clay Wks., Davis Coal Co., Cochran Coal Co., Hart and Parsons, Halley Coal Co., Sunday Creek Coal Co., Mohoney Ore and S. Co., The Black Fork C. Co., Ada Coal Co., Tropic
8670 Mng. Co., Tom Corwin Coal Co., H. L. Metzer, Alma Coal Co., Chapman Coal Co., Letsinger Coal Co., Elk Horn Coal Co., E. O. Roberts, The Johnson C. M. Co., Clark Bros., Western Lime Works, Zeller, McClellan and Co., Eureka Block Coal Co., G. W. Bigger, The Indiana Run Mng. Co., Hisylvania Stone Co., McGee Coal Co., Gallia Mng. Co., Mohr and Hinton, Morgan and Horton, Minshall C. M. Co., Alma Cement Co., Lumaghi Coal Co., Essex Coal Co., Diamond Brick Co., A. Juniper & Son, Comet Coal Co., Chris Holl, Jones and Morgan, J. C. Garland & Co., Silverweed Coal Co., Louisville Cement Co., Williams Coal Co., Chicago

Plaintiff's Exhibit 1359 8671

Linton C. Co., Lake Creek C. Co., The Buckeye Salt Co., Souther Fire Brick & Clay Co., Straitsville Imp. B. Co., Wells Creek Supply Co., John Evans L. & S. Co., Patrick Kehore & Co., Hillsbore Stone Co., Avonelle Coal Co., Carter Construction Co., Odin Coal Co., Boyd Coal and Coke Co., Honking Bovie Co., Merissa C. & M. Co., Hemlock Coal Co., Martin and Sines, Bell and Zoller C. Co., W. A. Gosline & Co., Suberban Coal Co., Superior C. & M. Co., Murphey Mine, Brilliant C. & C. Co., Little Muddy C. & M. Co., Luhrig Coal Co., Queen Coal Mng. Co., Crystal Coal Mng. Co., The Williams Bros. & M. Co., Harrison C. & M. Co., P. F. Sullivan, Buckeye Coal Co., Greenwood Davis D. Co., Sligo Furnace Co., The Coldfired Co., Columbus Quarry Co., Breakwater Const. Co., Paradice Coal Co., Lincoln C. & M. Co., 9/11/05; Lincoln C. &. M. Co., 1/22/06; Lincoln C. & M. Co., 5/16/05; Tirre C. & M. Co., 5/31/05; Tierre C. & M. Co., 7/16/06; Tierre C. & M. Co., 2/5/07; Sullivan Co. C. Co., 5/10/05; Buckeye F. B. & C. Co., 10/9/05; Buckeye F. B. & C. Co., 4/18/06; Peabody Coal Co., 8/31/06; Peabody Coal Co., 10/17/05; Spencer Stone Co., 6/22/06; Spencer Stone Co., 5/4/06; Chicago & Hocking, 1/29/07; Chicago & Hocking, 2/26/07; Chicago and Big Muddy, 8/1/07; Chicago & Big Muddy, 6/27/06; Breese Trenton Mng. Co., 6/4/06; Coal Bluff Mng. Co., 5/18/05; Grant Coal Co., 8/23/05; Soutern Coal Co., 9/5/05; Southern Coal Co., 9/5/05; India So. Coal Co., 5/18/05; Peabody, At. & Wart. C. M. Co., 5/28/05; Sullivan Coal Co., 8/7/05; Pitts Mining Co., Imperial Mining Co., F. H. Blodgett & Co., Indiana Bituminous, T. M. Meek Coal Co., D. Zihlsdorf, Mt. Olive and Staunton, C. F. Keeler Coal Co., New York Coal Co., Illinois Collieries Co., Jones and Adams Coal Co., Clark Coal and Coke, Western C. M. Co., Wear Coal Co.

8672

8673

8674 *Plaintiff's Exhibit 1360*

Plaintiff's Exhibit 1360.

B & A.
OUR TRADE RETAINED BY 95c AUTHORIZATION.

Robert Dick Coal Co., Clubey Miller Coal Co., Jackson Hill C. & C. Co., Oak Hill C. & M. Co., Hippard Coal Co., Johnson Coal Co., Coulterville Mng. Co., North Jackson Hill C. & M. Co., North Linton Coal Co., Sugar Creek Coal Co., Albert
8675 Hucke, C. A. Simms, Emma Coal Co., Latham Coal Co., Moore and Co., Hocking Mng. Co., Kelly Coal Co., Citizens Coal Mng. Co., Pettinger Davis M. & M. Co., Sandoval Coal & M. Co., The Black Diamond C. Co., Utica Cement Mfg. Co., Chicago and Carterville Coal Co., Taylor Coal Co., Mike Riley, Moores Lime Co., Muddy Valley M. & M. Co., Carterville and Big Muddy C. Co., C. A. Sims & Co., C. Ehrlich Coal Co., Athens Bar Co., Refrior Bar Co., Springfield Coal M. Co., Johnson Coal Co., Pittsburg Coal Co., Auburn and Alton C. Co., Chicago Colliery Co., Keller Coal Co., Superior Coal Co., Vigo County Coal Co., Central Co-op Coal Co., Silver Creek
8676 C. & M. Co., Superior Block C. Co., J. Taylor Coal Co., Co-op Coal Co., Fidelity C. M. Co., Centralia Coal Co., Lower Vein Block Coal Co., Collins Coal Co., Middletown Coal Co., Standard Washed Coal Co., Jasonville Coal Co., Springfield Co-op. Coal Co., Ayrshire Coal Co., New Pittsburg Coal Co., Electric Coal Co., Johnson City and Big Muddy C. & M. Co., Rush Coal Co., Majestic Coal and C. Co., West End Coal Co., Southern Coal Mng. Co., Rutledge & Taylor C. Co., Ziegler Dist Colliery Co., Sesser Construction Co., Star Coal Co., Woodside Coal Co., Park County Coal Co., Clinton Coal Co., Monmouth Coal Co.,

Superior Coal Co., Donk Bros. C. & C. Co., Peabody, Atwart C. M. Co., 11-1-06; Krapp and Less, Hafer Washed C. Co., Vulcan Coal Co., Decatur Coal Co., Carlisle Coal and Clay Co., Jones Bros. C. & M. Co., Norris Coal Mng. Co., Miller Horn C. M. Co., Kentucky C. M. Co., O'Reilly, Callahan and Given, Smith Lowe C. M. Co., Sabine Co. C. Co., Mo. and Ill. Coal Co., Boehmer Coal Co., T. J. O'Garra, Paradice C. & M. Co., Jupiter C. & M. Co., The J. R. Crow C. M. Co., The Cherokee and Pittsburg C. M. Co., The M. & K. & T. Ry. Co., Brazil Blk C. Co., 5-17-05; Brazil Blk C. Co., 6-28- 8678
06; Avery C. & M. Co., 5-31-05; Avery C. & M. Co., 5-16-07; Avery C. & M. Co., 5-23-07; St. Louis and O. Fallen, 5-9-05; St. Louis and O. Fallen, 5-28-06; Chgo. & Big Muddy C. & C. Co., 7-28-05; Chgo. & Big Muddy C. & Co. Co., 8-1-07; Chgo. & Big Muddy C. & C. Co., 6-27-06; Kob Coal Co., 6-29-06; Kob Coal Co., 8-28-05; O'Garra Coal Co., 8-9-06; O'Garra Coal Co., 8-30-05; O'Garra Coal Co., 7-11-06; Vandalin Coal Co., 6-28-06; Vandalin Coal Co., 1-29-07; Vandalin Coal Co., 9-14-05; New Pitts Coal Co., 3-21-07; New Pitts Coal Co., 3-28-07; Forester C. & C. Co., 6-4-06; Forester C. & C. Co., 9-26-06; Carthville Coal Co., 6-20-07; Carthville 8679
Coal Co., 6-4-06; Breese Trenton M. Co., 6-4-06; Breese Trenton M. Co., 10-1-06; New England Coal Co., 6-12-06; New England Coal Co., 9-3-06; Wabash Coal Co., 6-22-06; Wabash Coal Co., 7-16-06; Fullerton Coal Co., 6-25-06; Fullerton Coal Co., 8-15-07; Ind. Southern Coal Co., 6-29-06; Ind. Southern Coal Co., 7-25-07; Coal Bluff Mng. Co., 6-29-06; Coal Bluff Mng. Co., 2-5-07; Williamsville Coal Co., 7-26-06; Williamsville Coal Co., 1-29-07; Barclay C. & M. Co., 1-29-07; Barclay C. & M. Co., 8-9-06; Cora Coal Co., 8-9-06; Cora Coal Co., 8-24-06; Imperial C. & M. Co., 9-3-06; Imperial C. & M.

8680 Co., 4-30-07; Grant C. & M. Co., 1-22-07; Grant C. & M. Co., 11-1-06; United C. M. Co., 10-26-06; United C. M. Co., 4-18-07; So. C. Mng. Co., 11-106; So. C. & Mng. Co., 10-8-07; So. C & Mng Co., 1-3-07; So. C. & Mng. Co., 12-14-06; Willis Coal & Mng. Co., 12-8-05; Hart and Page, Sunnyside Coal Co., South Mountain Coal Co., Tuxhorn Coal Co., Springfield Colliery Co., Sangamon Coal Co., Capital Coal Co., Globe Iron Co., Newsam Bros., Big Creek Coal Co., Spring Creek Coal Co., Roanoke C. & M. Co., Canton Coal Co.

8681

Plaintiff's Exhibit 1361.

B.

TRADE WE LOST AFTER 95c AUTHORIZATION.

Brazil Clay Co., Richardson Newdorfer & Silcox, Logan Brick Co., New Ohio Washed Coal Co., Manufacturers Fuel Co., Bicknell Coal Co., Diamond Coal and Mining Co., Princeton C. M. Co., Carterville Mng. Co., S. B. Eaton & Co., Prairie State Coal & Co. Co., Summit C. & M. Co., Empire
8682 Coal Co., United C. & M. Co., 7-11-06; Hocking Mng. Co., Ohio Portland Cement Co., J. H. Sellers, Bailey Bros. Coal Co., C. L. Poston, Penna. and Ind. C. Co., Sunflower Coal Co., Cochran & Pinkerton, S. Walshdag & Bro., Dayton Coal and Iron Co., New England Coal Co., 1-3-07; Silver Run Coal Co., Hafer Washed Coal Co., Brenton Coal Co., Vivian Coal and M. Co., Smith Lhor C. M. Co., Bradfield and Dixon, Superior Portland C. Co., Knot Coal Co., Moore and Co., Tallula Coal Co., John McVey, B. R. Billingsley, Iron Clay Brick Co., Johnson Coal Co., Hocking Fuel Co., Gem Coal Co., George Gibbs, White Walnut Coal Co.,

Plaintiff's Exhibit 1396 8683

4-1-05; Diamond Coal & Mng. Co., 6-22-06; Portsmouth Harbinson Walker Co., Willis Coal & Mng. Co., Gallia Mng. Co., 9-13-06; Barders Coal Co., 1-15-07; Buckhorn Coal Co., 1-15-07; Horney and Winterbottom, Marrison C. & M. Co., Deering Coal Co., Cloverland Coal Co., Utica Hydra Cement Co., Petersburg Coal Co.

Plaintiff's Exhibit 1396.

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908

RECAPITULATION 8684

	BILLED				RETURNED	
Page	Kegs	Amount	Allowances	Freight	Kegs	Amount
1	6,065	$ 5,870.73		$ 155.08	249	$ 236.50
2	2,216	2,276.90		7.50	11	11.55
3	10,156	10,450.87	$ 29.88	1,130.37	17	16.90
4	3,247	3,272.96		88.78	50	50.60
5	7,860	8,010.00		449.85	60	62.39
6	14,453	13,311.60	163.10	314.73	51	51.10
7	6,343	6,557.24	67.50	456.49	426	417.48
8	3,525	3,551.40	40.00	252.12	301	276.92
9	5,906	6,208.90	24.00	60.56	1	1.00
10	12,776	14,028.70		1,901.34		
11	3,568	3,632.88		145.87		
12	13,680	13,154.85		484.23	155	155.00
13	32,620	31,946.00		2,891.58	401	390.98
14	19,973	18,604.24	3.50	684.95	3	2.88
15	20,089	19,776.20		1,417.09	103	108.02
16	2,546	2,680.14		250.17	47	48.10
17	8,565	9,317.01		1,160.16	114	106.00
18	12,413	12,237.00		1,255.59	64	63.17
19	8,150	8,058.88	25.75	671.85	477	471.58
20	28,451	29,291.15	30.00	2,856.80	248	228.37
21	4,386	4,249.66		317.40		
22	384	416.20		4.65		
23	89	103.75				
Totals	227,461	$227,007.26	$383.73	$16,957.16	2,778	$2,698.54

8685

GRAND SUMMARY

	Kegs	Amount	Average peg Keg
Sales Billed	227,461	$227,007.26	99.8
Less: Allowances		383.73	.2
	227,461	$226,623.53	99.6
Less Returns, etc.	2,778	2,698.54	97.1
	224,683	$223,924.99	99.7
Less Freights		16,957.16	7.6
Net Sales, after deducting Freight, etc.	224,683	$206,967.83	92.1

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908

Date	Customer	BILLED Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
Aug. 29, '06	Applegate & Lewis Coal Co., Peoria, Ill...	50	.95	47.50					
Sept. 4	" " "	20	.95	19.00					
" 14	" " "	50	.95	47.50					
" 26	" " "	50	.95	47.50			44	.95	$ 41.80
Oct. 9	" " "	50	.95	47.50			1	.95	.95
" 17	" " "	50	.95	47.50			1	.95	.95
Feb. 28, '07	" " "	50	.95	47.50					
June 3	" " "	50	.95	47.50					
" 5	" " "	150	.95	142.50					
July 11	" " "	170	.95	161.50			150	.95	142.50
Sept. 7	" " "	100	.95	95.00					
" 23	" " "	100	.95	95.00			52	.95	49.40
Oct. 15, '07	Assumption C. & M. Co., Assumption, Ill...	50	.95	47.50		6.40			
" 28	" " "	50	.95	47.50					
Nov. 5	" " "	600	.95	570.00		30.00			
Oct. 1, '06	Astoria & Woodland Coal Co., Astoria, Ill.	10	.95	9.50					
" 26	" " "	50	.95	47.50		3.63			
Dec. 3	" " "	50	.95	47.50					
Jan. 29, '07	" " "	50	.95	47.50					
June 20	" " "	50	.95	47.50					
July 11	" " "	50	.95	47.50					
Sept. 3	" " "	50	.95	47.50					
" 25	" " "	50	.95	47.50					
Oct. 26, '05	Atkins, Reuben	10	1.28	12.80		1.45			
Dec. 1	"	15	1.28	19.20		2.17			

BUCKEYE POW DER COMPANY
SUMMARY FROM THE BOO KS FOR THE PERIOD FROM
SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Jan.	8, '06	"	12	1.28	15.36		1.35				
"	22, '08	Babcock & Co., Mankato, Minn.	25	1.13½	28.37						
Oct.	1, '06	W. B. Ballentine, Wyoming, Ill.	50	1.10	55.00						
Dec.	8	" " "	50	1.10	55.00						
Mar.	14, '07	" " "	25	.95	23.75						
Aug.	6	" " "	25	.95	23.75						
Oct.	4	" " "	50	.95	47.50						
Jan.	21, '08	" " "	50	1.10	55.00						
June	11	" " "	25	1.10	27.50						
July	23, '06	Frank Bateman, Wyoming, Ill.	50	1.00	50.00						
Aug.	14	" " "	8	1.00	8.00						
Sept.	4	" " "	10	1.00	10.00						
Dec.	17	" " "	10	1.00	10.00						
Nov.	6, '05	Bevier Coal & M. Co., Bevier, Mo.	800	1.04	832.00		70.08				
June	16, '06	Big Creek Coal Co., St. David, Ill. 1,000		.90	900.00			1	.90	.90	
July	18	" " "	1,000	.90	900.00						
Nov.	6, '07	" " "	100	1.05	105.00		10.00				
"	14, '07	" " "	800	1.05	840.00		30.00				
			6,065		$5,870.73		$155.08	249		$236.50	
Jan.	18, '08	Briggs & Davis, Tallula, Ill.	50	1.15	57.50		7.50				
Jan.	29, '07	Bontjes & Bontjes, Kramms Sta., Ill.	50	.95	47.50			11	1.05	11.55	
Feb.	6	" " "	50	.95	47.50						
"	18	" " "	50	.95	47.50						
"	28	" " "	50	.95	47.50						
"	9	" " "	50	.95	47.50						
Mch.	12	" " "	70	.95	66.50						
"	29	" " "	50	.95	47.50						
Apr.	4	" " "	50	.95	47.50						
"	18	" " "	50	.95	47.50						

8699 8699 8699

2897

Plaintiff's Exhibit 1936

8694 8693 8692

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Date	Customer	BILLED Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
" 26	" " "	50	.95	47.50					
May 10	" " "	50	.95	47.50					
" 24	" " "	50	.95	47.50					
June 3	" " "	50	.95	47.50					
" 13	" " "	50	.95	47.50					
" 26	" " "	54	.95	51.30					
July 11	" " "	50	.95	47.50					
" 22	" " "	50	.95	47.50					
Sept. 7	" " "	50	.95	47.50					
" 23	" " "	50	1.05	52.50					
Oct. 18	" " "	50	1.05	52.50					
" 26	" " "	50	1.05	52.50					
Nov. 5	" " "	50	1.05	52.50					
" 14	" " "	50	1.05	52.50					
" 20	" " "	7	1.05	7.35					
" 22	" " "	35	1.05	36.75					
" 27	" " "	50	1.05	52.50					
Dec. 3	" " "	50	1.10	55.00					
" 11	" " "	50	1.10	55.00					
" 19	" " "	50	1.10	55.00					
" 30	" " "	50	1.10	55.00					
Jan. 7, '08	" " "	50	1.10	55.00					
" 14	" " "	60	1.10	66.00					
" 21	" " "	60	1.10	66.00					
" 31	" " "	60	1.10	66.00					
Feb. 7	" " "	55	1.10	60.50					
" 22	" " "	55	1.10	60.50					
" 28	" " "	60	1.10	66.00					
Mar. 4	" " "	30	1.10	33.00					
" 9									

2898

Plaintiff's Exhibit 1936

Plaintiff's Exhibit 1936

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

"	10		"	"	"	60	1.10	66.00					
"	23		"	"	"	60	1.10	66.00					
Apr.	2		"	"	"	50	1.10	55.00					
"	14		"	"	"	50	1.10	55.00					
						2,216		$2,276.90		$7.50	11		$11.55

Date	Customer	BILLED Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
Apr. 23, '08	Bontjes & Bontjes, Kramms Sta., Ill	60	1.10	66.00					
Aug. 21	" " "	38	1.05	39.90			5	1.10	5.50
" 28	" " "	50	1.05	52.50					
Oct. 4, '05	C. G. Brechnitz, Belleville, Ill.	800	.92	736.00					
Oct. 10, '05	John Buckley, Coal Valley, Ill.	400	1.10	440.00		73.68			
Jan. 18, '06	" " "	400	1.10	440.00		73.68			
May 23	" " "	400	1.03	412.00		52.00			
Oct. 1	" " "	800	.95	760.00		58.71			
Dec. 28	" " "	800	.95	760.00		54.41	12	.95	11.40
June 28, '07	" " "	400	1.00	400.00		60.00			
Sept. 27	" " "	50	.95	47.50		11.00			
Oct. 5	" " "	800	.95	760.00		62.99			
Dec. 17	" " "	800	1.00	800.00		59.70			
May 13, '08	" " "	400	1.07	428.00		57.00			
Sept. 30, '05	Bunting Bros., Grape Creek, Ill.	100	1.08	108.00					
Nov. 3	" " "	100	1.08	108.00		48.52			
Dec. 13	" " "	100	1.08	108.00					
Oct. 22, '07	W. Burdette, Pottstown, Ill.	3	1.05	3.15					
Dec. 17	" " "	12	1.05	12.60					
Feb. 3, '08	" " "	10	1.05	10.50					
July 2, '06	Butler Bros., Hilbrig, Minn.	1,000	1.13	1,130.00		230.00			
July 1, '07	" " "	1,000	1.10	1,100.00		177.38			

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Date	Customer	Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	RETURNED Price	RETURNED Amount
Oct. 9, '05	Canton Coal Co., Canton, Ill.	50	1.06	53.00					
Jan. 17, '06	" " "	100	1.05	105.00		5.38			
Mar. 22	" " "	100	1.05	105.00		5.38			
Dec. 18	" " "	100	1.05	105.00					
" 27	" " "	100	1.05	105.00	29.88				
Jan. 20, '07	" " "	100	1.05	105.00		38.28			
" 22	" " "	125	1.10	137.50					
Aug. 31, '08	T. W. Carrico, Rockford, Ill.	50	1.12½	56.25		6.38			
Nov. 9, '05	" " "	50	1.12½	56.25		6.38			
Dec. 18	F. R. Carter, East Peoria, Ill.	50	1.10	55.00					
July 14, '08	James Catton, West Jersey, Ill.	8	1.15	9.20		1.85			
Aug. 10, '06	" " "	10	1.15	11.50		2.54			
Jan. 29, '07	" " "	10	1.15	11.50		2.55			
Feb. 11	" " "	10	1.15	11.50		2.56			
Sept. 5	Century Coal Co., Tower Hill, Ill.	460	1.07½	494.00		40.00			
Jan. 1, '08	Chicago & N. W. Ry. Co., Chicago	100	1.00	100.00					
Feb. 16, '06	" " "	36	.95	34.20					
Aug. 14	" " "	24	.93	22.32					
Sept. 4	" " "	50	.93	46.50					
Nov. 2									
		10,156		$10,450.87	$29.88	$1,130.37	17		$16.90

Date	Customer	Kegs	Price	Amount
Nov. 29, '06	Chicago & N. W. R. R. Co., Chicago	25	.90	22.50
"	" " "	25	.90	22.50
Jan. 5, '07	" " "	50	.90	45.00
Jan. 10	" " "	25	.90	22.50
Mar. 7	" " "	50	.90	45.00
Sept. 20, '07	Chicago, Burlington & Quincy R. R. Co.	13	1.08½	14.11

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM
SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Oct.	26		"	"	"	2	1.05	2.10					
Jan.	20,	'08	"	"	"	2	1.10	2.20					
Mar.	5,	'08	James Christensen, Bradford, Ill.			20	1.10	22.00					
July	14,	'06	Christy & Co., Viola, Ill.			400	1.03	412.00	28.40				
Oct.	2		"	"	"	400	1.00	400.00	28.93				
Nov.	16		"	"	"	400	1.00	400.00	28.40				
Sept.	23,	'05	Clark, Quien & Morse, Peoria, Ill.			2	1.00	2.00					
"	30		"	"	"	8	1.00	8.00					
Oct.	31		"	"	"	67	1.00	67.00		2½	1.00	2.50	
Nov.	30		"	"	"	90	1.00	90.00	1.01	25	1.00	25.00	
Dec.	31		"	"	"	61	1.00	61.00	.46	6	1.00	6.00	
									.74	13	1.00	13.00	
Jan.	31,	'06	"	"	"	132	1.00	132.00					
Feb.	28		"	"	"	57	1.00	57.00					
Mar.	31		"	"	"	35	1.00	35.00					
May	31		"	"	"	56	1.00	56.00	.84				
June	30		"	"	"	42	1.00	42.00					
July	31		"	"	"	16	1.00	16.00					
Aug.	1		"	"	"	18	1.00	18.00					
Sept.	30		"	"	"	29	1.00	29.00					
Oct.	31		"	"	"	51	1.00	51.00					
Nov.	30		"	"	"	60	1.00	60.00					
Dec.	31		"	"	"	24	1.00	24.00					
Jan.	31,	'07	"	"	"	66	1.00	66.00					
Feb.	28		"	"	"	57	1.00	57.00					
Mch.	20		"	"	"	8	1.00	8.00					
Apr.	30		"	"	"	51	1.00	51.00					
May	23		"	"	"	29	1.00	29.00					
June	30		"	"	"	25	1.00	25.00					
July	31		"	"	"	67	1.00	67.00					
Aug.	31		"	"	"	64	1.00	64.00					
Sept.	30		"	"	"	64	1.00	64.00					

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Plaintiff's Exhibit 1936

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Oct.	31		"	"	"	95	1.00	95.00			2	1.00	2.00
"	31		"	"	"	36	1.05	37.80					
Nov.	30		"	"	"	168	1.05	176.40					
Dec.	31		"	"	"	102	1.05	107.10					
Jan.	31,	'08	"	"	"	122	1.05	128.10			2	1.05	2.10
Feb.	28		"	"	"	83	1.05	87.15					
Mar.	31		"	"	"	42	1.05	44.10					
Apr.	27		"	"	"	8	1.05	8.40					
						3,247		$3,272.96		$88.78	50½		$50.60

Date			Customer	BILLED Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
May	31,	'07	Clark, Quien & Morse, Peoria, Ill.	27	1.05	28.35		.60			
June	30		" " "	45	1.05	47.25					
July	31		" " "	18	1.05	18.90					
"	"		" " "	18	1.15	20.70					
Aug.	1		" " "	15	1.10	16.50					
"	"		" " "	17	1.15	19.55					
May	24,	'07	Cober & Co., Wyoming, Ill.	5	1.10	5.50					
Dec.	13,	'06	Collier Co-op. C. Co., Peoria, Ill.	100	.95	95.00					
Mch.	3,	'08	" " "	100	1.10	110.00					
Sept.	26,	'06	Concrete Construction Co., R. I., Ill.	800	.95	760.00		44.00			
Jan.	22,	'08	T. R. Coughlan, Mankato, Minn.	250	1.13½	283.75					
Oct.	10,	'06	Consolidated C. & I. Co., Clark City, Ill....	402	1.00	402.00		32.00			
Jan.	20,	'07	" " "	400	1.00	400.00		44.00			
Feb.		'08	Crescent Coal Co., Breeds, Ill.	50	1.10	55.00					
Mar.	3		" " "	50	1.10	55.00					
June	2		" " "	50	1.10	55.00					
Oct.			Cusack & Edwards, Youngs, Ill. (Edwards Mining Co.)	50	1.05	52.50					

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM
SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Nov.	8		"	"	"	25	1.05	26.25				
Dec.	19		"	"	"	20	1.05	21.00				
Jan.		'06	"	"	"	60	1.05	63.00				
Feb.			"	"	"	65	1.05	68.25				
Mar.			"	"	"	57	1.05	59.85		16	1.05	16.80
May	4		"	"	"	20	1.05	21.00				
July	17		"	"	"	10	1.05	10.50				
Aug.	30		"	"	"	10	1.05	10.50				
Sept.	11		"	"	"	10	1.05	10.50				
Oct.			"	"	"	40	1.05	42.00				
Nov.			"	"	"	45	1.05	47.25				
Dec.			"	"	"	40	1.05	42.00		15	1.10	16.59
Jan.		'07	"	"	"	60	1.05	63.00				
Feb.	20		"	"	"	20	1.05	21.00				
Mar.	29		"	"	"	10	1.05	10.50				
May	to Dec.		"	"	"	40	1.05	42.00				
"	"		"	"	"	94	1.10	103.40				
June	17,	'08	James Dalton, Elmwood, Ill.			10	1.10	11.00				
July	21		"	"	"	10	1.25	12.50				
Aug.	28		"	"	"	10	1.25	12.50				
Oct.	19,	'05	De Camp C. & M. Co., Stanton, Ill.			800	1.05	840.00	58.75			
Mar.	8,	'06	"	"	"	800	1.05	840.00	55.00			
Oct.	10,	'06	"	"	"	7	1.00	7.00				
"	23		"	"	"	800	1.00	800.00	57.50	29	1.00	29.00
Apr.	8,	'07	"	"	"	800	1.00	800.00	62.70			
Oct.	21,	'07	"	"	"	800	1.00	800.00	32.80			
June	12,	'08	"	"	"	800	1.00	800.00	62.50			
						7,860		$8,010.00	$449.85	60		$62.39

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Plaintiff's Exhibit 1936

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BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

		Customer	BILLED Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
Oct.	10, '05	Dering Coal Co., Chicago	1,000	1.00	1,000.00		50.50			
Jan.	18, '06	" " "	1,000	1.00	1,000.00		49.50	49	1.00	49.00
Jan.	18, '06	" " "	50	1.00	50.00					
Mar.	5, '06	" " "	1,100	1.10	1,210.00	110.00	54.45			
Oct.	16, '05	Dieleman Coal Co., Pella, Ia.	100	1.25	125.00		30.08			
Jan.	16, '06	" " "	100	1.40	140.00		30.80			
Sept.	24, '07	Drake Hdw. Co., Davenport, Iowa	10	.90	9.00					
Feb.	14, '06	Drake Hdw. Co., Burlington, Iowa	5	1.10	5.50					
Mch.	24, '06	" " "	2	1.10	2.20					
Sept.	11, '06	East Cuba Coal Co., Cuba, Ill.	10	.95	9.50		2.40			
"	22	" " "	100	.95	95.00					
Oct.	11, '07	" " "	200	.95	190.00					
Nov.	15, '05	Edwards Coal & Coke Co., Edwards, Ill.	7	1.25	8.75					
Dec.	16	" " "	2	1.25	2.50					
"	19	" " "	4	1.25	5.00					
Jan.	18, '06	" " "	5	1.25	6.25					
Feb.	12	" " " (2-½)	1	1.40	1.40					
			1	1.25	1.25					
"	16	" " "	9	1.25	11.25					
Apr.	28	" " "	4	1.25	5.00					
Oct.	10	" " "	2	1.25	2.50	1.35				
Nov.	16	" " "	1	1.25	1.25					
Dec.	21	" " "	5	1.25	6.25					
Oct.	22, '07	Paul Edwards, Edwards, Ill.	10	1.05	10.50					
Nov.	18	" " "	15	1.05	15.75					
Jan.	18, '08	" " "	20	1.05	21.00					
Feb.	11	" " "	25	1.05	26.25			2	1.05	2.10
May	11	" " "	10	1.10	11.00					
June	7, '06	Egyptian Powder Co., Chicago, Ill.	800	.90	720.00					

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Date	Customer	Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	RETURNED Price	RETURNED Amount
" 26	" " "	1,200	.90	1,080.00					
July 23, '07	" " "	800	.76½	612.00					
" 26	" " "	400	.76½	306.00					
Aug. 6	" " "	800	.76½	612.00					
Sept. 7	" " "	800	.76½	612.00					
" 23	" " "	800	.76½	612.00					
Mar. 2, '08	Emmons-Hawkins Hdw. Co., Huntington, W. Va.	800	1.10	880.00		97.00			
Dec. 24, '06	Farwell, Ozmun Kirk & Co., St. Paul, W. Va.	1,000	.90	900.00	18.00				
Jan. 9, '07	" " "	875	.90	787.50	15.75				
Apr. 6	" " "	1,000	.90	900.00	18.00				
Aug. 26	" " "	1,000	.90	900.00					
Aug. 9, '07	Fleming & McDaniel Co., Wyoming, Ill.	10	1.10	11.00					
Sept.	" " "	35	1.10	38.50					
Oct. 28	" " "	30	1.10	33.00					
Nov. 21	" " "	50	1.10	55.00					
Dec. 18	" " "	54	1.10	59.40					
Feb. '08	" " "	100	1.10	110.00					
Apr. 20	" " "	51	1.10	56.10					
May 13	" " "	50	1.10	55.00					
		14,453		$13,311.60	$163.10	$314.73	51		$ 51.10
Oct. 11, '06	W. E. Foley, Peoria, Ill.	10	1.00	10.00		2.00			
Nov. 3	" "	10	1.00	10.00					
May 11, '07	" "	10	1.00	10.00					
July 10	" "	10	1.00	10.00		8.75			
	" "	10	1.00	10.00		2.00			
	" "	10	1.00	10.00		2.50			

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Plaintiff's Exhibit 1936

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Jan.	22, '08	Fowler & Pay, Mankato, Minn.	350	1.13½	397.25		123.75					
Sept.	20, '06	S. French, Bradford, Ill.	10	1.10	11.00							
Nov.	16	" "	25	1.10	27.50							
July	8, '08	" "	15	1.10	16.50							
Nov.	13, '05	Robt. Gage Coal Co., Bay City, Mich	800	1.00	800.00							
"	14	" " "	800	1.00	800.00	60.00						
Sept.	30	Gartside Coal Co., Murphysboro, Ill.	50	1.05	52.50		7.76					
Oct.	14	Gapen, F. E., & Co., Sparland, Ill.	20	1.10	22.00							
Nov.	15	" " "	20	1.10	22.00							
Oct.	7, '05	Goetz Bros., St. Louis, Mo.	100	1.15	115.00	7.50	5.25					
Dec.	12, '06	Jos. Goss & Son, Carteville, Ia.	50	1.10	55.00		15.95					
May	10, '06	Grafton Quarry Co., Grafton, Ill.	25	1.15	28.75		8.61					
Nov.	7	" " "	10	1.15	11.50		2.55					
Oct.	14, '05	Great Northern Fuel Co., Novinger, Mo.	1,000	1.07	1,070.00		134.02					
Apr.	15, '07	Granite City Granite Co., St. Cloud, Minn.	20	1.35	27.00		5.88					
Sept.	28, '06	Greenview Coal & M. Co., Greenview, Ill.	300	.98	294.00			250	.98	245.00		
Oct.	12	" " "	100	.98	98.00		12.00					
"	26	" " "	200	.98	196.00		35.94					
Nov.	16	" " "	400	.98	368.00		30.00	176	.98	172.48		
Dec.	6	" " "	38	.98	37.24							
Dec.	19, '06	Greenview Coal Co., Greenview, Ill.	800	.98	784.00		35.20					
Aug.	27, '07	" " "	50	1.04	52.00		6.35					
Oct.	15	" " "	50	1.04	52.00		6.00					
Nov.	16	" " "	50	1.10	55.00							
Dec.	30	" " "	100	1.10	110.00							
Feb.	5, '08	" " "	100	1.10	110.00							
Mar.	6	" " "	100	1.10	110.00							
Apr.	14	" " "	100	1.10	110.00							
"	30	" " "	200	1.10	220.00							
June	25	" " "	200	1.10	220.00							
Aug.	17	" " "	50	1.25	62.50							

Plaintiff's Exhibit 1936

BUCKEYE POW DER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM
SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Mar.	24, '06	Hanson, A. J., Johnson City, Ill.	50	1.05	52.50					
Nov.	13, '05	Hart & Page, Rockford, Ill	50	1.10	55.00		6.88			
Mch.	20, '07	" " "	50	1.10	55.00		5.10			
			6,343		$6,557.24	$67.50	$456.49	426		$417.48

Date		Customer	BILLED Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
June	25, '08	Hart & Page, Rockford, Ill.	100	1.12½	112.50		10.20			
Aug.	13, '06	Heitzman, B. H., Bartonville, Ill.	5	1.15	5.75					
Sept.	5	" " "	10	1.15	11.50		1.25			
Oct.	27, '05	Henderson, Thos., & Son, Ashland, Ky. ..	800	1.00	800.00	40.00	96.30			
Jan.	3, '08	Higbee, A. W., Princeville, Ill.	25	1.10	27.50					
Apr.	15, '07	Holes Bros., St. Cloud, Minn.	20	1.35	27.00		27.65			
Dec.	24, '06	Howard, Charles, Bradford, Ill.	50	1.10	55.00					
Apr.	16, '07	" " "	50	1.10	55.00					
Sept.	21	" " "	50	1.10	55.00					
Nov.	26	" " "	50	1.10	55.00					
Sept.	18, '06	Howarth & Taylor, Edwards, Ill.	25	.96	24.00		.50			
Oct.		" " "	31	.96	29.76					
Nov.		" " "	95	.96	91.20					
Dec.		" " "	20	.96	19.20					
Jan.	'07	" " "	65	.96	62.40					
Feb.		" " "	280	.96	268.80					
Mar.		" " "	115	.96	110.40					
Apr.		" " "	125	.96	120.00					
Sept.		" " "	65	.96	62.40					
Oct.		" " "	75	.96	72.00					
Nov.		" " "	50	1.05	52.50					
"		" " "	85	1.05	89.25					

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Dec.	2		"	"	"	15	1.05	15.75					
"	11		"	"	"	25	1.10	27.50					
Mar.	30,	'08	"	"	"	10	1.10	11.00					
Nov.	9,	'05	Hutchinson Bros., Dawson, Ia.			50	1.45	72.50		16.77			
Jan.	8,	'06	"	"	"	60	1.45	87.00		20.01			
Nov.	2,	'05	Hydraulic Pressed Brick Co., St. Louis...			100	1.10	110.00		5.20			
Sept.	4,	'06	Illinois Colliers Co., Springfield, Ill.			50	.92	46.00		5.38			
Oct.	1		"	"	"	48	.92	44.16			48	.92	44.16
"	10		"	"	"	400	.95	380.00		6.86			
Nov.	22		"	"	"	100	.95	95.00		32.00			
"	30		"	"	"	20	.95	19.00					
Feb.	20,	'06	Jobst, Bethard & Co., Peoria, Ill.			2	1.00	2.00					
Aug.	31,	'06	Jones & Adams, Springfield, Ill.			210	.92	193.20			145	.92	133.40
Oct.	1		"	"	"	39	.92	35.88		30.00	8	.92	7.36
"	3		"	"	"	25	.92	23.00					
Nov.	7		"	"	"	100	.92	92.00			100	.92	92.00
Jan.	8,	'06	Jones, James H., Peoria, Ill.			15	1.10	16.50					
Aug.	10,	'06	Jones, Thomas, Pottstown, Ill.			6	1.15	6.90					
"	29		"	"	"	6	1.15	6.90					
Sept.	11		"	"	"	6	1.15	6.90					
"	29		"	"	"	6	1.15	6.90					
Oct.	31		"	"	"	31	1.15	35.65					
Nov.	21		"	"	"	10	1.15	11.50					
						3,525		$3,551.40	$40.00	$252.12	301		$276.92

Date			Customer	BILLED Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
Dec.		'06	Jones, Thomas, Pottstown, Ill.	20	1.15	23.00					
Jan.	20,	'07	" " "	10	1.15	11.50					

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM
SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Feb.			"	"	"	31	1.15	35.65					
Mch.			"	"	"	25	1.15	28.75					
Apr.	22		"	"	"	15	1.15	17.25					
May	9		"	"	"	15	1.15	17.25					
June	24		"	"	"	15	1.15	17.25					
Oct.			"	"	"	30	1.15	34.50					
Nov.	8		"	"	"	15	1.15	17.25	.60				
Dec.			"	"	"	30	1.15	34.50					
Jan.	14,	'08	"	"	"	15	1.15	17.25					
Feb.			"	"	"	30	1.15	34.50					
Mar.	10		"	"	"	18	1.15	20.70					
Apr.	13		"	"	"	17	1.15	19.55					
May	11		"	"	"	15	1.15	17.25					
Oct.	12,	'05	Keeler, Chas. F., Coal Co., Chicago, Ill. ...			800	1.00	800.00	56.25	1	1.00	1.00	
Nov.	2,	'07	Keller Coal Co., Bartonville, Ill.			10	1.05	10.50					
Sept.	28,	'05	Kewanee G. & M. Co., Kewanee, Ill.			50	1.10	55.00					
Oct.			"	"	"	150	1.10	165.00					
Nov.			"	"	"	150	1.10	165.00					
Dec.			"	"	"	200	1.10	220.00					
Jan.		'06	"	"	"	150	1.10	165.00					
Feb.			"	"	"	150	1.10	165.00					
Mch.			"	"	"	150	1.10	165.00					
Apr.	26		"	"	"	50	1.10	55.00					
May			"	"	"	200	1.10	220.00					
June			"	"	"	200	1.10	220.00					
July			"	"	"	100	1.10	110.00					
Aug.			"	"	"	100	1.10	110.00					
Sept.	26		"	"	"	50	1.10	55.00					
Oct.			"	"	"	150	1.10	165.00					
Nov.			"	"	"	100	1.10	110.00	3.71				
"			"	"	"	100	1.05	105.00					

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Plaintiff's Exhibit 1936

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BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Dec.	11		"	"	"	100	1.05	105.00				
Jan.		'07	"	"	"	200	1.05	210.00				
Feb.			"	"	"	50	1.05	52.50				
Mch.			"	"	"	200	1.05	210.00				
Apr.			"	"	"	245	1.05	257.25				
May			"	"	"	225	1.05	236.25				
June			"	"	"	225	1.05	236.25				
July			"	"	"	225	1.05	236.25				
Aug.			"	"	"	225	1.05	236.25				
Sept.			"	"	"	250	1.05	262.50				
"	30		"	"	"	800	.95	760.00	24.00			
						5,906		$6,208.90	$24.00	$60.56	1	$1.00

Date			Customer	BILLED Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
Dec.	5,	'07	Kewanee C. & M. Co., Kewanee, Ill.	800	1.05	840.00		30.00			
Apr.	11,	'08	" " "	800	1.04½	834.00		31.50			
May	8,	'06	Keystone Coal M. Co., Des Moines, Ia. ...	200	1.06	212.00		19.25			
Mar.	30,	'06	Krakauer, Zork & Moye, El Paso, Tex. ...	1,000	1.40	1,400.00		451.00			
Apr.	28		" " "	1,000	1.35	1,350.00		451.00			
Mch.	7,	'06	La Salle Co., Carbon C. Co., La Salle, Ill.	50	.95	47.50		4.23			
July	25		" " "	50	.95	47.50		4.23			
Oct.	5		" " "	800	.95	760.00		33.00			
Sept.	13,	'07	" " "	800	1.00	800.00		46.86			
Nov.	26		" " "	600	1.05	630.00		48.00			
Feb.	6,	'08	" " "	200	1.10	220.00		12.00			
June	16,	'08	" " "	125	1.10	137.50					
"	8,	'06	Lee Bros. Coal Co., What Cheer, Ia.	400	1.04	416.00		53.00			
Dec.	24,	'06	" " "	400	1.02	408.00		58.30			
Sept.	14,	'07	" " "	400	1.05	420.00		60.00			

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Jan.	23, '07	"	"	"	400	1.17½	470.00		60.00		
Jan.	3, '08	Lincoln Mng. Co., Lincoln, Ill.			10	.95	9.50		2.27		
Nov.	24, '06	Lincoln Park C. & B. Co., Spring, Ill.			100	.95	95.00				
Dec.	13	"	"	"	100	.95	95.00				
Oct.	24, '05	Lost Creek Fuel Co., Muchakinock, Ia.			750	1.07½	806.25		119.90		
Apr.	28, '06	"	"	"	800	1.00	800.00		55.00		
Aug.	31	"	"	"	800	1.00	800.00		83.00		
Jan.	10, '07	Henry W. Lynch, Edwards, Ill.			1	1.25	1.25				
"	10	(Warsaw Coal Co.)			1	1.25	1.25				
Aug.	7	"	"		1	1.25	1.25				
"	8	"	"		1	1.25	1.25				
	23	"	"		1	.95	.95				
"	29	"	"		25	.95	23.75				
		"	"		25	.95	23.75				
Sept.	30	H. W. Lynch, Peoria, Ill.			25	.95	23.75				
		"	"		85	.95	80.75				
Oct.		"	"		125	1.05	131.25				
Nov.		"	"		200	1.05	210.00				
Dec.		"	"		35	1.05	36.75				
Jan.	31, '08	"	"		100	1.05	105.00				
Feb.		"	"		150	1.05	157.50				
Mar.		"	"		30	1.25	37.50				
Aug.	8, '06	McAlester-Choctaw Coal Co., Archibald			800	1.25	1,000.00		262.80		
Sept.	11	"	"	" I. T.	5	1.00	5.00				
Sept.	30, '05	McCoy Co., Jas., Peoria, Ill.			10	1.75	17.50				
May	21, '06	McClure Coal Co., Tasker, N. Dak.			10	1.10	11.00				
Dec.	5, '06	McDaniel, Jacob, Wyoming, Ill.			50	1.00	50.00				
Aug.	27, '06	Manchester Coal Co., Chicago, Ill.			50	1.00	50.00				
Sept.	26	"	"	"	461	1.00	461.00		16.00		
Oct.											
					12,776		$14,028.70		$1,901.34		

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Plaintiff's Exhibit 1936

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Date	Customer	BILLED Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
Feb. 20, '07	Manchester Coal Co., Chicago, Ill.	100	1.00	100.00		13.75			
Mch. 26	" " "	100	1.00	100.00					
May 17	" " "	100	1.00	100.00		12.10			
July 8	" " "	100	1.00	100.00					
Aug. 13	" " "	100	1.00	100.00					
Oct. 28	" " "	50	1.10	55.00					
Dec. 12	" " "	50	1.10	55.00					
Jan. 21, '08	" " "	50	1.10	55.00					
Feb. 28	" " "	50	1.10	55.00					
Mch. 23	" " "	20	1.10	22.00					
Apr. 14	" " "	50	1.10	55.00					
June 11	" " "	25	1.10	27.50					
Jan. 22, '08	Mankato Cement Co., Mankato, Minn.	225	1.13½	255.38					
Sept. 30, '05	Manufacturers' C. & C. Co., Connellsville, Mo.	100	1.10	110.00		33.00			
June 26, '06	Marquette 3rd Vein C. Co., Sparland, Ill...	10	1.30	13.00		2.55			
Aug. 2	" " "	10	1.30	13.00		2.55			
Jan. 29, '07	" " "	10	1.30	13.00		2.54			
June 8, '06	" " "	10	1.30	13.00		2.78			
" 12	Marshall, G. A., Cuba, Ill.	10	1.15	11.50					
Aug. 2	" "	10	1.15	11.50		2.56			
Oct. 17	" "	15	1.15	17.25					
Nov. 24	" "	20	1.15	23.00		4.62			
Dec. 15	" "	15	1.15	17.25		3.42			
Feb. 4, '07	Metzger, August F., Mackinaw, Ill.	12	1.00	12.00					
" 22	" " "	12	1.00	12.00					
Mch. 28, '08	Middleton & Seidel, Sandoval, Ill.	100	1.15	115.00					
Apr. 8	" " "	100	1.12½	112.50		12.50			
June 11	" " "	200	1.12½	225.00		12.50			

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

"	18		"	"	"		200	1.12½	225.00		12.00		
July	8		"	"	"		200	1.12½	225.00		29.00		
July	1, '07	Milan Coal Co., Milan, Mo.				.....	10	.95	9.50				
Aug.	28		"	"			50	.95	47.50				
Sept.	30		"	"			25	.95	23.75				
Oct.	18		"	"			25	.95	23.75				
Nov.	8		"	"			30	1.10	33.00				
"	30		"	"			50	1.10	55.00				
Dec.	9		"	"			10	1.10	11.00				
"	26		"	"			25	1.10	27.50				
June	25, '08		"	"			6	1.10	6.60				
Sept.	12		"	"			50	1.10	55.00				
Mch.	25, '07	J. G. Miller, Chicago, Ill.				(1,500-⅓)	750	.87	652.50				
May	17		"	"			12	.95	11.40				
"	21		"	"			400	.90	360.00				
"	20		"	"		(2-½)	1	1.00	1.00				
Apr.	5, '05		"	"			50	.95	47.50				
Apr.	7, '05		"	"			20	.95	19.00				
							3.568		$3,632.88		$145.87		

			BILLED					RETURNED		
		Customer	Kegs	Price	Amount	Allowances	Freight	Kegs	Price	Amount
May	27, '07									
June	14									
"	17	Miller, J. G., Chicago, Ill.	400	.90	360.00					
Aug.	13	" "	20	.90	18.00					
"	19	" "	1,000	.86	860.00					
Sept.	30	" "	50	.90	45.00					
Oct.	8	" "	20	.90	18.00					
		" "	1,000	.86	860.00					
Dec.	19	" " { 1276½ }	638	.87 }	727.06					
Jan.	17, '08		200	.86 }						

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Plaintiff's Exhibit 1936

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BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Jan.	29		"	"		25	.95	23.75					
			"	"		400	1.12½	450.00		30.00			
Mch.	17		"	"	{ 2000½ }	1,000	.87						
April	8					220	.86	1,159.20					
"	30		"	"		50	1.00	50.00					
May	21		"	"		25	1.00	25.00					
June	3		"	"		1,000	1.00	1,000.00					
"	6		"	"		15	1.00	15.00					
Aug.	19		"	"		800	1.00	800.00					
Sept.	30,	'05	"	"		25	1.00	25.00					
Oct.	4,	'05	"	"		50	1.05	57.50					
Feb.	12,	'06	M. & O. Ry. Co., Mobile, Ala.			150	1.03	154.50					
June	15		Mt. Olive & Staunton C. Co., Staunton, Ill.			800	1.00	800.00		55.00			
Sept.	4		"	"	"	800	1.00	800.00		55.00			
Oct.	22		"	"	"	800	1.00	800.00		66.00			
Jan.	9,	'07	"	"	"	800	1.00	800.00		55.00			
Feb.	6		"	"	"	800	1.00	800.00		54.00	155	1.00	155.00
Oct.	17		"	"	"	800	1.00	800.00		62.70			
Mch.	26,	'06	"	"	"	800	1.00	800.00		61.60			
Nov.	1,	06	"	"	"	800	1.00	800.00		35.00			
Dec.	27		Myer, Carl, What Cheer, Iowa			12	1.02	12.24		3.50			
Feb.	6,	'07	Neave, Jas., Mineral, Ill.			12	1.10	13.20					
May	13		"	"		12	1.10	13.20					
June	18		"	"		12	1.10	13.20					
Sept.	4		"	"		12	1.10	13.20					
Oct.	18		"	"		12	1.10	13.20					
Nov.	14		"	"		12	1.10	13.20					
Feb.	10,	'08	"	"		12	1.10	13.20					
Oct.	1,	'06	"	"		25	1.10	27.50					
Oct.	27,	'05	"	"		12	1.10	13.20					
Feb.	4,	'07	Newsam Bros., Peoria, Ill.			25	.95	23.75		4.07			

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

June	5	N. Y. & St. L. Mg. & Mg. Co., Aetna, Tenn.	4	1.00	4.00						
Oct.	10	Noel, N., Frederick, Ill.	5	1.15	5.75		.78				
Oct.	22	" "	5	1.15	5.75						
Dec.	3	" "	5	1.15	5.75		.80				
		" "	10	1.10	11.00						
		" "	5	1.10	5.50						
			13,680		$13,154.85		$484.23	155		$155.00	

Date	Customer	BILLED Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
Dec. 30, '07	Noel, N., Frederick, Ill.	5	1.10	5.50					
Jan. 31, '08	" "	5	1.10	5.50					
Oct. 7, '05	Northwestern C. M. Co., Bevier, Mo.	800	1.00	800.00		70.72			
Nov. 14	" " "	800	1.00	800.00		70.08			
Dec. 12	" " "	800	1.00	800.00		70.40			
Jan. 6, '06	" " "	10	1.00	10.00					
" 10	" " "	800	1.00	800.00		75.56			
Feb. 1	" " "	800	1.00	800.00		79.04			
" 26	" " "	800	1.00	800.00		70.40			
Mch. 10	" " "	800	1.00	800.00		70.08			
June 15	" " "	800	.97½	780.00		70.97			
Aug. 11	" " "	800	.97½	780.00		67.52			
Sept. 12	" " "	800	.97½	780.00		70.40			
Oct. 5	" " "	800	.97½	780.00		70.40			
Nov. 3	" " "	800	.97½	780.00		70.81			
" 20	" " "	800	.97½	780.00		70.40			
Dec. 1	" " "	800	.97½	780.00		70.40			
Dec. 28	" " "	800	.97½	780.00		70.40			
Jan. 10, '07	" " "	800	.97½	780.00		70.40			
Feb. 4	" " "	800	.97½	780.00		70.40			

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Date			Customer	Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
June	12,	'08	Northeastern C. M. Co., Bevier, Mo.	800	.97½	780.00		70.40			
July	3		" " "	800	.97½	780.00					
"	14		" " "	800	.97½	780.00		70.40			
"	28		" " "	800	.97½	780.00		70.40			
Mch.	29		" " "	800	.97½	780.00		70.40			
May	2		" " "	800	.97½	780.00		70.40			
May	27		" " "	800	.97½	780.00		70.40	401	.97½	390.98
June	13		" " "	800	.97½	780.00					
June	26		" " "	800	.97½	780.00		140.80			
July	2		" " "	800	.97½	780.00		70.40			
July	19		" " "	800	.97½	780.00		70.40			
Aug.	5		" " "	800	.97½	780.00		70.40			
Sept.	12		" " "	800	.97½	780.00		70.40			
Oct.	5		" " "	800	.97½	780.00					
Nov.	2		" " "	800	.97½	780.00					
Nov.	6		" " "	800	.97½	780.00		211.20			
Nov.	14		" " "	800	.97½	780.00					
Dec.	9		" " "	800	.97½	780.00		140.80			
Dec.	18		" " "	800	.97½	780.00		70.40			
Jan.	8,	'08	" " "	800	.97½	780.00		70.40			
Feb.	12		" " "	800	.97½	780.00		70.40			
Mch.	4		" " "	600	.97½	585.00		64.00			
Mch.	19		" " "	800	.97½	780.00					
May	25		" " "	800	.97½	780.00		140.80			
June	3		" " "	800	.97½	780.00		70.40			
Sept.	6,	'07	" " "								
				32,620		$31,946.00		$2,891.58	401		$390.98

"	9	"	"	"	800	.97½	780.00		140.80
Dec.	26, '06	Northwestern Imp. Co., Red Lodge, Mont.			1,000	.88	880.00		
June	3, '07	"	"	"	1,000	.87	870.00		
July	11	"	"	"	1,000	.87	870.00		
Aug.	12	"	"	"	1,000	.87	870.00		
Sept.	6	"	"	"	1,000	.87	870.00		
Oct.	17	"	"	"	1,000	.87	870.00		
Dec.	2	"	"	"	1,400	.87	1,218.00		
Dec.	22	"	"	"	900	.87	783.00		
July	17, '06	Norwell-Shapleigh Hdw. Co., St. Louis, Mo.			5	.98	4.90		
Aug.	20	"	"	"	6	.96	5.76		
Oct.	23	"	"	"	4	.96	3.84		
Dec.	24	"	"	"	4	.96	3.84		
Jan.	10, '07	"	"	"	25	.96	24.00		
Feb.	6	"	"	"	25	.96	24.00		
"	21	"	"	"	25	.96	24.00		
Oct.	29	"	"	"	25	1.10	27.50	3.50	
Nov.	30	"	"	"	25	1.10	27.50		
Dec.	19	"	"	"	25	1.10	27.50		
Feb.	10, '08	"	"	"	4	1.10	4.40		
Nov.	22, '07	Pendergast Bros., Soperville, Ill.			25	1.10	27.50		
Dec.	5	"	"	"	50	1.10	55.00		
Dec.	26	"	"	"	50	1.10	55.00		
Aug.	30, '06	Peterson, Nicholas, Bradford, Ill.			15	1.15	17.25		.75
Oct.	1	"	"	"	50	1.10	55.00		
Dec.	1	"	"	"	50	1.10	55.00		
Feb.	14, '07	"	"	"	50	1.10	55.00		
Oct.	22	"	"	"	50	1.10	55.00		
Dec.	21	"	"	"	50	1.10	55.00		
Feb.	6, '08	"	"	"	50	1.10	55.00		
Apr.	14	"	"	"	25	1.10	27.50		
July	21	"	"	"	35	1.25	43.75		

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Plaintiff's Exhibit 1936

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM
SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Date	Customer	BILLED Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
May 28, '06	Phillips Fuel Co., Rutledge, Iowa	800	1.00	800.00		44.00			
July 6	(Black Diamond Store)	800	1.00	800.00		44.00			
" 12	" "	1,000	1.00	1,000.00		55.00			
Sept. 4	" "	1,000	1.00	1,000.00		55.00			
" 26	" "	1,000	1.00	1,000.00		55.00			
Oct. 3	" "	1,000	.92½	925.00		55.00			
" 24	" "	1,000	.92½	925.00		55.00	3	.92½	288.00
Nov. 24	" "	1,000	.92½	925.00		55.00			
Dec. 24									
		19,973		$18,604.24	3.50	$684.95	3		$288.00
Jan. 29, '07	Phillips Fuel Co., Rutledge, Ia.	1,000	.92½	925.00		110.00			
Jan. 29	" " "	1,000	.92½	925.00		55.00			
Feb. 21	" " "	1,200	.92½	1,110.00		66.00			
June 5	" " "	1,000	.92½	925.00		55.00			
Sept. 9	" " "	1,000	.92½	925.00		55.00			
Jan. 14, '08	" " "	1,000	.95	950.00		55.00			
March 4	" " "	1,000	.95	950.00		55.00			
June 9		5	1.10	5.50					
July 29, '07	Pittman Bros., Cuba, Ill.	100	1.15	115.00		12.77			
May 10, '06	Port Byron Lime Assn., Port Byron, Ill.	100	1.15	115.00		12.82			
Sept. 18	" " "	100	1.15	115.00		12.77			
Apr. 6, '07		5	1.25	6.25		.82			
Oct. 20, '06	Lowell & Son, Mapleton, Ill.	800	1.00	800.00		35.45			
Oct. 28, '05	Powers & Williams, Streator, Ill.	800	.98	784.00		30.30			
Sept. 20, '06	" " "	800	1.04	832.00		117.72	6	1.04	6.2
Sept. 30, '05	Randolph Macon Coal Co., Huntsville, Mo.	800	1.04	832.00		85.80	7	1.04	7.2
Oct. 2, '05	" " "								

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

"	7		"	"	"	800	1.04	832.00	85.80			
"	12		"	"	"	800	1.04	832.00	85.80 8.80			
"	28		"	"	"	300	1.04	312.00	63.53			
Nov.	6		"	"	"	800	1.04	832.00	111.24			
Nov.	9,	'05	Reents & Bros., A., Kramms, Ill.			40	1.05	42.00				
Dec.	16,	'05	"	"	"	33	1.05	34.65		33	1.05	34.65
Jan.	3,	'06	"	"	"	228	1.05	239.40				
Feb.			"	"	"	156	1.05	163.80				
March			"	"	"	208	1.05	218.40				
May			"	"	"	200	1.05	210.00				
June			"	"	"	160	1.05	168.00				
July	25		"	"	"	50	1.05	52.50				
Aug.	10		"	"	"	50	1.05	52.50				
Oct.	24		"	"	"	29	1.05	30.45		57	1.05	59.85
Nov.			"	"	"	100	1.05	105.00				
Dec.			"	"	"	135	1.05	141.75				
Jan.		'06	"	"	"	160	1.05	168.00				
Sept.	30,	'05	Robinson & Cary Co., St. Paul, Minn.			475	1.00	475.00	24.15			
Apr.	10,	'06	"	"	"	1,000	1.00	1,000.00	102.80			
July	18,	'06	Rockdale Powder Co., York, Pa.			350	.88	308.00				
Oct.	2,	'05	Rogers Coal & M. Co., Olivet, Iowa			50	1.40	70.00				
Oct.	4,	'07	"	"	"	75	1.30	97.50	21.86			
Nov.	11		"	"	"	100	1.30	130.00	30.00			
Feb.	24.	'08	"	"	"	50	1.30	65.00	14.58			
May	19		"	"	"	80	1.30	104.00	23.32			
Sept.	17,	'07	Royal Colliery Co., Virden, Ill.			150	.95	142.50	11.51			
"	30		"	"	"	800	.95	760.00				
Nov.	5		"	"	"	1,000	.95	950.00	74.25			
						20,089		$19,776.20	$1,417.09	103		$108.02

Plaintiff's Exhibit 1936

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Plaintiff's Exhibit 1936

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BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Date	Customer	BILLED Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
Sept. 30, '05	Sackville, Jas., Coal Valley, Ill.	750	1.03	772.50		81.05			
Aug. 8, '06	" " "	750	1.08	810.00		81.05			
Oct. 1, '06	Sangamon Coal Co., Springfield, Ill.	30	.98	29.40			30	.98	29.40
Nov. 13	" " "	400	.98	392.00		32.00			
Oct. 28, '05	Sexton Bldg. Matl. Co., Chicago, Ill.	10	1.15	11.50					
Nov. 2	" " "	25	1.15	28.75		9.04			
Nov. 15	" " "	25	1.15	28.75		6.38			
Dec. 2	" " "	25	1.15	28.75		6.38			
Jan. 12, '06	" " "	25	1.15	28.75		6.38			
Feb. 26	" " "	25	1.15	28.75		6.38			
Mch. 22	" " "	25	1.15	28.75		6.38			
Apr. 12	" " "	25	1.15	28.75		6.38			
" 26	" " "	50	1.15	57.50		6.38			
July 29, '07	Shady Lane Coal Co., Wyoming, Ill.	10	1.10	11.00					
Sept. 23	" " "	25	1.10	27.50					
Oct. 18	" " "	25	1.10	27.50					
Nov. 21	" " "	25	1.10	27.50					
Dec. 23	" " "	25	1.10	27.50					
Jan. 21, '08	" " "	50	1.10	55.00					
July 24	" " "	25	1.25	31.25					
Dec. 21, '06	Sholl Bros., Peoria, Ill.	20	.95	19.00					
Dec. 31	" "	40	.95	38.00			17	1.10	18.70
Aug. 13, '07	Simmons Coal Co., Canton, Ill.	20	1.05	21.00		2.37			
Jan. 24, '07	Simmons Hdw. Co., St. Louis, Mo.	4	.96	3.84					
" 24	" " "	2	.96	1.92					
" 29	" " "	10	.96	9.60					
Feb. 4	" " "	6	.96	5.76					
" 6	" " "	1	.96	.96					
Mch. 29	" " "	3	.96	2.88					

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM
SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

May	21		"	"	"	2	.96	1.92					
June	20		"	"	"	4	.96	3.84					
Sept.	14		"	"	"	4	.96	3.84					
Oct.	17		"	"	"	5	.96	2.88					
Apr.	24,	'07	Smith, Edison J., Ellwood, Ill.			7	1.00	7.00					
Oct.	18		"	"	"	7	1.00	7.00					
Nov.	6		"	"	"	7	1.10	7.70					
Nov.	21		"	"	"	7	1.10	7.70					
Dec.	17		"	"	"	7	1.10	7.70					
Jan.	25,	'08	"	"	"	7	1.10	7.70					
Feb.	3		"	"	"	7	1.10	7.70					
"	10		"	"	"	7	1.10	7.70					
"	25		"	"	"	7	1.10	7.70					
Apr.	20		"	"	"	7	1.10	7.70					
May	11		"	"	"	7	1.10	7.70					
						2,546		$2,680.14		250.17	47		$48.10

			BILLED					RETURNED		
Mch.	9, '06	Customer	Kegs	Price	Amount	Allowances	Freight	Kegs	Price	Amount
Aug.	10, '06									
Dec.	5, '05	Somers, J. H., Coal Co., Cleveland, Ohio...	800	1.00	800.00		66.90			
Jan.	17, '06	South Mountain C. Co., Petersburg, Ill....	50	1.10	55.00		6.38			
Feb.	20	Spanhour, C., Bryant, Ill.	10	1.28	12.80		1.35			
		Springfield Colly Co., Springfield, Ill.	100	1.00	100.00		12.77			
		" " "	50	.92	46.00		6.38			
	Date									
Jan.	16, '06	" " "	100	.92	92.00			100	.92	92.00
Dec.	13, '05	Spring Creek C Co., Springfield, Ill.	50	1.00	50.00		6.38			
Jan.	8, '06	Standard Coal Co., East Peoria, Ill.	10	1.15	11.50					
Oct.	17, '05	Standard Co-op. Coal Co., Canton, Ill. ...	50	1.15	57.50					
Aug.	31, '06	" " "	50	1.15	57.50		2.69			
Nov.	22, '06	" " "	50	1.15	57.50		2.69			

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Plaintiff's Exhibit 1936

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BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM
SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Apr.	2		"	"	"	50	1.15	57.50	5.38					
May	8		"	"	"	50	1.15	57.50	5.38					
June	7 & 30		"	"	"	100	1.15	115.00	4.94 & 2.69					
July	23		"	"	"	50	1.15	57.50	2.69					
Aug.	23		"	"	"	50	1.15	57.50	2.75					
Sept.	11		"	"	"	50	1.15	57.50	2.69					
Oct.	3		"	"	"	100	1.15	115.00	5.39					
Dec.	7, '05	Star Coal Co., Ottumwa, Iowa				365	1.20	438.00	56.10					
Aug.	25, '06		"	"	"	400	1.10	440.00	44.00					
Dec.	31		"	"	"	400	1.10	440.00	40.00					
June	26, '07		"	"	"	50	.99	49.50						
Aug.	13		"	"	"	400	1.05	420.00	51.00					
Dec.	10		"	"	"	400	1.17½	470.00	56.10					
Apr.	30, '08		"	"	"	400	1.17½	470.00	40.00					
Apr.	16, '06	Stevenson I. M. Co., Hibbing, Minn.				875	1.12½	984.38	158.00					
May	17		"	"	"	875	1.12½	984.38	244.80					
June	6, '07		"	"	"	1,500	1.10	1,650.00	266.06					
Apr.	15, '07	St. Cloud Granite Works, St. Cloud, Minn.				20	1.35	27.00	5.88					
June	18, '08	Sunnyside Fuel Co., Cuba, Ill.				10	1.00	10.00						
Sept.	26		"	"	"	10	1.00	10.00						
Oct.	19		"	"	"	10	1.00	10.00						
Dec.	20		"	"	"	10	1.00	10.00						
June	19, '06	Sunnyside Coal Co., Cuba, Ill.				731	.95	694.45	43.00					
Jan.	9, '07	Sunnyside Fuel Co., Cuba, Ill.				25	1.00	25.00						
Feb.	7		"	"	"	14	1.00	14.00						
Mch.	12		"	"	"	10	1.00	10.00	2.00	14	1.00	14.00		
May	27		"	"	"	10	1.00	10.00						
June	14		"	"	"	25	1.00	25.00						
Sept.	12		"	"	"	25	1.00	25.00						
Oct.	14		"	"	"	50	1.00	50.00						
Nov.	21		"	"	"	50	1.10	55.00						

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Date	Customer	Kegs	Price	Amount	Allowances	Freight	Kegs	Price	Amount
		BILLED					RETURNED		
Oct. 17, '07	Superior Coal Co., Bened, Ill.	100	1.05	105.00		15.77			
June 4, '08	Sparland Co-op. Coal Co. Chillicothe, Ill.	10	1.10	11.00					
June 16	" " "	10	1.10	11.00					
July 10	" " "	10	1.10	11.00					
		8,565		$9,317.01		$1,160.16	114		$106.00
Nov. 14, '06	Talmage, W. A., Co., Red Lodge, Mont...	1,000	1.00	1,000.00		105.00			
Feb. 20, '07	" " "	1,000	1.00	1,000.00		105.20			
June 26	" " "	1,300	.99	1,287.00		136.80			
July 17	" " "	1,000	.99	990.00		120.00			
Nov. 8	" " "	800	.99	792.00		128.00			
Aug. 11, '06	Taylor Bros., Princeville, Ill.	10	1.15	11.50					
Oct. 10	" " "	20	1.15	23.00		5.11			
Dec. 12	" " "	20	1.15	23.00		1.98			
Dec. 26	" " "	15	1.15	17.25					
Jan. 5, '07	" " "	20	1.15	23.00					
Feb. 4	" " "	20	1.15	23.00					
Feb. 28	" " "	15	1.15	17.25					
Apr. 23	" " "	15	1.15	17.25					
Apr. 24	" " "	13	1.15	14.95					
July 15	" " "	15	1.15	17.25			13	1.25	16.25
Aug. 23	" " "	15	1.15	17.25					
Sept. 30	" " "	20	1.15	23.00					
Oct. 29	" " "	30	1.10	33.00					
Dec. 12	" " "	30	1.10	33.00					
Jan. 6, '08	" " "	20	1.10	22.00					
Feb. 1	" " "	20	1.10	22.00					
" 28	" " "	30	1.10	33.00					

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Plaintiff's Exhibit 1986

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Plaintiff's Exhibit 1936

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM
SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Date			Customer	Kegs	Price	Amount	Allowances	Freight	Kegs	Price	Amount
May	11		" " "	20	1.10	22.00					
Aug.	1		" " "	20	1.25	25.00					
Dec.	27,	'06	Third Vein C. Co., Orchard Miles, Ill. ...	10	.95	9.50					
Jan.	29,	'07	" " "	10	.95	9.50					
March	2		" " "	10	.95	9.50					
Sept.	30,	'05	Thomas Coal Co., Evansville, Ind.	50	1.04	52.00		10.31			
Oct.	20,	'05	Thomas Coal Co., {Evansville, Ind. / Morgansfield, Ky.}	750	1.04	780.00					
			" " "	400	1.10	440.00		199.00			
Aug.	29,	'07	" " "	100	1.10	110.00		22.45			
Jan.	29,	'07	" " "	200	1.10	220.00					
May	6,	'07	" " "	20	1.00	20.00					
June	17,	'07	Tripp Bros., Greenview, Ill.	585	1.00	585.00		30.00			
Dec.	13,	'05	Turigliatto, Jos., Diamond, Ill.	600	.95	570.00		30.00			
March	7,	'06	" " "	500	.95	475.00		30.00			
June	21		" " "	800	.90	720.00		33.00			
Dec.	5		" " "	600	.90	540.00		30.00			
May	13,	'07	" " "	600	.90	540.00		30.00			
Sept.	23		" " "		(Donated)						
Sept.	1,	'06	Tuxhorn Coal Co., Keys Station, Ill.	100	.92	92.00		10.00	51	.92	46.92
Sept.	5,	'06	" " "	10	.98	9.80		4.34			
Jan.	29,	'07	U. S. Gypsum Co., Chicago, Ill.	800	.98	784.00		136.40			
Feb.	27		" " "	800	.98	784.00		88.00			
Apr.	25		" " "								
				12,413		$12,237.00		$1,255.59	64		$63.17

Date			Customer	BILLED Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
June	28,	'07	U. S. Gypsum Co., Chicago, Ill.	800	.98	784.00		88.00			
Sept.	12		" " "	800	.98	784.00		88.00			
Nov.	6		" " "	800	.98	784.00		88.00			

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM
SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Feb.	6, '08	"	"	"	800	.98	784.00		88.00				
Mch.	21, '07	Utica Hydraulic Cement Co., Utica, Ill. ..			800	.92	736.00		33.00				
July	29	"	"	"	800	.92	736.00		30.15				
Oct.	26, '07	Wainwright, Arthur, Sweetwater, Ill.			150	1.00	150.00						
Sept.	22, '05	Walsh Coal Co., Peoria, Ill.			50	1.00	50.00						
"	28	"	"	(R. Walsh)	100	.95	95.00						
"	30	"	"	"	2	1.00	2.00						
Oct.	4	"	"	"	50	1.00	50.00						
"	7	"	"	"	100	1.00	100.00						
"	10	"	"	"	50	1.00	50.00						
"	12	"	"	"	50	1.00	50.00			235	1.00	235.00	
"	17	"	"	"	100	1.00	100.00		4.02				
"	24	"	"	"	100	1.00	100.00						
"	27	"	"	"	100	1.00	100.00			1	1.00	1.00	
Nov.	9	"	"	"	100	1.00	100.00			20	1.00	20.00	
Dec.	1	"	"	"	50	1.00	50.00		2.32	4	1.00	4.00	
Jan.	13, '06	"	"	"	125	1.00	125.00			84	1.00	84.00	
Feb.	20	"	"	"	75	1.00	75.00						
July	2	"	"	"	150	1.00	150.00	18.75		57	1.00	57.00	
Mch.	2, '07	Wantling I. & Co., Peoria, Ill.			25	.96	24.00						
Mch.	6	"	"	"	50	.96	48.00						
April	4	"	"	"	50	.96	48.00						
"	26	"	"	"	50	.96	48.00	7.00					
May	17	"	"	"	100	.92	92.00						
June	5	"	"	"	50	.92	46.00						
"	25	"	"	"	50	.92	46.00						
July	17	"	"	"	50	.92	46.00			50	.92	46.00	
Aug.	2	"	"	"	50	.92	46.00						
"	16	"	"	"	75	.92	69.00						
Feb.	22, '08	"	"	"	24	.92	22.08			24	.92	22.08	

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Plaintiff's Exhibit 1936

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Plaintiff's Exhibit 1936

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BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Date	Customer	Kegs	Price	Amount	Allowances	Freight	Kegs	Price	Amount
		BILLED					RETURNED		
June 20, '06	Warrick & Warrick, Colfax, Iowa	50	1.35	67.50		15.40			
Jan. 31, '08	Watson & Anderson, Wyoming, Ill.	50	1.10	55.00					
March 1	" " "	50	1.10	55.00					
Nov. 13, '05	Waverly Coal Mfg. Co., Waverly, Mo.....	800	1.07	856.00		112.00			
Feb. 24, '06	" " "	400	1.08	432.00		110.00			
Oct. 10, '05	Wenoma Coal Co., Wenona, Ill.	12	1.50	18.00		3.06			
Nov. 25	" " "	12	1.50	18.00		3.06			
Jan. 13, '06	" " "	12	1.50	18.00		3.06			
June 16	" " "	12	1.30	15.60		3.06			
July 23	" " "	24	1.30	31.20		.72			
Aug. 14, '05	Waite, James, Peoria, Ill.	2	1.25	2.50			2	1.25	2.50
		8,150		$8,058.88	$25.75	$671.85	477		$471.58
Dec. 1, '05	Wenoma C. & M. Co., Bay City, Mich. ...	800	1.00	800.00					
Aug. 16, '07	Western C. & M. Co., St. Louis, Mo.	1,000	1.08½	1,085.00		165.00			
Sept. 6	" " "	1,000	1.08½	1,085.00		165.00			
Oct. 31	" " "	1,000	1.08½	1,085.00		165.00			
Oct. 4	" " "	1,000	1.08½	1,085.00		165.00			
Dec. 6	" " "	1,000	1.08½	1,085.00		165.00			
Jan. 10, '08	" " "	1,000	1.08½	1,085.00		165.00			
" 14	" " "	1,000	1.08½	1,085.00		165.00			
" 18	" " "	1,000	1.08½	1,085.00		165.00			
Feb. 14	" " "	1,000	1.08½	1,085.00		165.00			
" 17	" " "	1,000	1.13	1,130.00		165.00	1	1.13	1.
" 28	" " "	1,000	1.13	1,130.00		165.00			
July 2	West Riverside Coal Co., Des Moines, Ia.	200	1.06	212.00		23.50			
Feb. 24, '08	Westerly, Geo., Farmington, Ill.	15	1.10	16.50					
May 8, '06									

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM
SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Apr.	26, '06	Western Stone Co., Lamont, Ill.	600	1.00	600.00	30.00	30.00				
"		" " "	600	.95	570.00		30.00				
Apr.	6, '07	" " "	800	1.45	1,160.00		380.00				
Jan.	26, '06	Whitacre & Co., R. B., St. Paul, Minn....	800	1.45	1,160.00						
Sept.	21, '05	Whitebreast Fuel Co., Chicago, Ill.	1,000	.92	920.00						
"	22	" " "	1,000	.92	920.00						
"		" " "	940	.92	864.80						
Oct.	16	" " "	1,000	.92	920.00						
"	18	" " "	200	.92	184.00						
"	27	" " "	200	.92	184.00						
"	30	" " "	100	.92	92.00						
Nov.	6	" " "	800	.92	736.00			247	.92	227.24	
"	11	" " "	800	.92	736.00						
"	11	" " "	100	.92	92.00						
"	21	" " "	800	.92	736.00						
"	25	" " "	1,000	.92	920.00						
Jan.	12, '06	" " "	4	1.10	4.40						
Dec.	17, '07	Wickwire, H. H., Oak Hill, Ill.	4	1.10	4.50						
Jan.	16, '08	" " "	4	1.10	4.40						
Feb.	5	" " "	4	1.10	4.40						
May	13	" " "	150	1.13½	170.25						
Jan.	22, '08	Widell & Co., Mankato, Minn.	800	1.00	800.00		61.60				
Oct.	26, '05	Willis Coal & M. Co., St. Louis, Mo.	500	1.00	500.00		55.46				
"	31	" " "	800	1.00	800.00		60.20				
Nov.	20	" " "	800	1.00	800.00		61.60				
Jan.	24, '06	" " "	800	1.00	800.00		57.12				
Feb.	2	" " "	800	1.00	800.00		57.12				
"	26	" " "	800	1.00	800.00		60.20				
Apr.	24										
Jan.	11, '06	Walker, I.	30	1.00	30.00						
			28,451		$29,291.15	$30.00	$2,856.80	248		$228.37	

Plaintiff's Exhibit 1936

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BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

Date	Customer	BILLED Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
Nov. 16, '06	Wantling, I. & Co., Peoria, Ill.	13	.96	12.48					
Dec. 17	" " "	10	.96	9.60					
Dec. 6	" " "	25	.96	24.00					
" 17	" " "	25	.96	24.00					
" 21	" " "	25	.96	24.00					
Jan. 5	" " "	25	.96	24.00					
" 3	" " "	25	.96	24.00					
" 10	" " "	25	.96	24.00					
" 21	" " "	25	.96	24.00					
" 24	" " "	25	.96	24.00					
Feb. 14	" " "	25	.96	24.00					
Jan. 10, '07									
June 5, '06	Winters Coal Co., Peoria, Ill.	20	1.05	21.00					
Sept. 19	Woodside Coal Co., Springfield, Ill.	125	.92	115.00		15.00			
July 20, '06	Zihlsdorf, Marissa, Ill.	800	.95	760.00		61.60			
Oct. 20	" "	800	.95	760.00		61.60			
Dec. 13	" "	800	.95	760.00		61.60			
Sept. 9, '07	" "	800	.95	760.00		61.60			
Aug. 3, '08	" "	400	1.05	420.00		56.00			
Dec. 1, '05	Cash Sales	50	1.08	54.00					
Jan. 6, '06	" "	12	1.10	13.20					
" 24	" "	3	1.40	4.20					
" 29	" "	2	1.25	2.50					
Feb. 15	" " (A. Roland)	50	1.08	54.00					
Feb. 28	" "	9	1.20	10.80					
Mar. 24	" "	3	1.25	3.75					
" 24	" "	10	1.05	10.50					
Apr. 18	" "	64	1.00	64.00					
" 18	" "	1	1.25	1.25					

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Plaintiff's Exhibit 1936

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM
SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

"	23	"	"			2	1.00	2.00				
"	24	"	"			50	1.08	54.00				
May	19	"	"	(Bateman)		56	1.00	56.00				
"	19	"	"			1	1.25	1.25				
June	1	"	"			50	1.05	52.50				
"	21	"	"			3	1.13	3.38				
"	5	"	"			6	1.00	6.00				
July	2	"	"	(Bateman)		6	1.00	6.00				
"	9	"	"	"		6	1.00	6.00				
"	23	"	"			1	1.00	1.00				
Aug.	30	"	"			1	1.25	1.25				
"	30	"	"			2	1.25	2.50				
"	30	"	"			5	1.10	5.50				
						4,386		$4.249.66		$317.40		

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Date				Customer	BILLED Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
June	16, '06	Cash	Sales.	.....	10	1.00	10.00					
Sept.	7	"	"		4	1.00	4.00					
"	18	"	"		2	1.25	2.50					
"	18	"	"		5	1.10	5.50					
"	22	"	"		1	1.25	1.25					
Oct.	10	"	"		13	1.10	14.30					
"	19	"	"		8	1.25	10.00					
"	20	"	"		2	1.00	2.00					
"	22	"	"		6	1.10	6.60					
"	22	"	"		50	1.05	52.50		4.65			
"	25	"	"		3		3.45					
"	30	"	"		4	1.25	5.00					

BUCKEYE POWDER COMPANY
SUMMARY FROM THE BOOKS FOR THE PERIOD FROM
SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

"	30		"	"	5	1.10	5.50				
Nov.	7		"	"	7	1.10	7.70				
"	10		"	"	3	1.10	3.30				
"	22		"	"	7	1.10	7.70				
"	26		"	"	2	1.25	2.50				
Jan.	5,	'07	"	"	6	1.10	6.60				
"	21		"	"	50	1.00	50.00				
Feb.	2		"	"	2	1.25	2.50				
"	9		"	"	2	1.25	2.50				
"	9		"	"	6	1.10	5.60				
"	9		"	"	1	1.25	1.25				
"	11		"	"	4	1.10	4.40				
Mch.	12		"	"	3	1.00	3.00				
April	17		"	"	2	1.25	2.50				
May	15		"	"	2	1.25	2.50				
June	17		"	"	3	1.10	3.30				
"	29		"	"	1	1.25	1.25				
July	29		"	"	1	1.25	1.25				
Aug.	8		"	"	50	1.00	50.00				
Sept.	18		"	"	10	1.10	11.00				
Oct.	10		"	"	10	1.00	10.00				
"	10		"	"	10	1.25	12.50				
"	15		"	"	12	1.25	15.00				
"	17		"	"	2	1.25	2.50				
"	19		"	"	12	1.25	15.00				
"	31		"	"	50	1.05	52.50				
Nov.	2		"	"	7	1.25	8.75				
"	6		"	"	1	1.25	1.25				
"	14		"	"	4	1.25	5.00				
"	29		"	"	1	1.25	1.25				
					384		$416.20		$4.65		

2990

Plaintiff's Exhibit 1986

Plaintiff's Exhibit 1936

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BUCKEYE POWDER COMPANY

SUMMARY FROM THE BOOKS FOR THE PERIOD FROM SEPTEMBER 19th, 1905, TO SEPTEMBER, 1908.

1907		Customer	Kegs	Price	Amount	Allowances	Freight	RETURNED Kegs	Price	Amount
Dec.	5	Cash Sales	50	1.10	55.00					
"	18	" "	14	1.25	17.50					
Jan.	3	" "	2	1.25	2.50					
"	7	" "	5	1.25	6.25					
"	14	" "	2	1.25	2.50					
"	18	" "	3	1.25	3.75					
Mch.	30	" "	2	1.25	2.50					
June	22	" "	8	1.25	10.00					
Aug.	28	" "	3	1.25	3.75					
			89		$103.75					

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8794 **Plaintiff's Exhibit 1429.**

Average monthly spot price of Nitrate of Soda at New York, in 50 ton lots and over, 96%, compiled from actual sales, made by New York brokers.

	1903	1904	1905	1906	1907
Jan.	1.90	2.12	2.37½	2.20	2.45
Feb.	1.90	2.13½	2.31	2.29	2.45
Mar.	2.07½	2.17½	2.38	2.25	2.50
Apr.	2.01	2.27½	2.40	2.27½	2.75
May	2.01	2.27	2.40	2.30	2.55
June	206	2.20	2.55	2.35	2.55
8795 July	2.00	2.11	2.42½	2.28	2.47½
Aug.	2.12½	2.15	2.23	2.41	2.47½
Sept.	2.12½	2.12½	2.19	2.57½	
Oct.	2.10	2.25	2.27½	2.60	
Nov.	2.05	2.32½	2.25	2.60	
Dec.	2.12½	2.37½	2.25	2.47½	

Plaintiff's Exhibit 1433.

Buckeye Powder Company
Statement of Profit & Loss a/c Balances
Dec. 31, 1905 *and May* 31*st* 1906

8796 *Exhibit P* 73—*folio* 25

Balance at debit May 31st 1906

"1906 May 31 Deficit to date per statement J 28 $5,684.51
Exhibit P 71—*folio* 24-96

(Dr $13,183.48)

Balance at debit Jan 1st 1906

(Cr $13,049.29) $134.22

Plaintiff's Exhibit 1434.

8797

BUCKEYE POWDER COMPANY.

Schedule Showing Certain Sales and Returns of Powder Applicable to the Period Prior to Sept. 19, 1905.

Date Billed.	Consignee and Address.	No. of Kegs Billed.	Price Billed per Keg.	Rebates per Keg.	No. of Kegs Returned.	
5/4/05	Ball Coal Co., Bartonville, Ills.	6	1.10			
7/3	" " "	10	1.10			
8/5	" " "	10	1.10		2	
8/17/05	Bell Coal Co., Peoria, Ills.	10	1.25		2	
12/7/04	Big Hill Coal Co., Lucas, Iowa	20	1.50			
2/7/05	Blk. Diamond C. Co., Auburn, Ills.	50	1.10			
2/25	" " "	1000	1.05			
6/1	" " "	1200	1.05		624	
7/7	" " "	800	1.05		280	
5/9/04	Boehmer Coal Co., St. Louis, Mo.	800	1.12½			
8/31/04	Boetticher Kellogg Co., Evansville, Ind.	20	1.08			
6/13/05	Bohlander Bros., Pekin, Ills.	10	1.15			
7/15	" " " "	15	1.10			8798
7/21	" " " "	75	1.02			
9/21/04	Boyd G. M. Co., Knobnoster, Mo.	25	1.55			
3/2/05	" " " "	25	1.55			
7/9/04	Brady Coal Co., Pontiac, Ills.	20	1.10			
7/18	" " " " "	25	1.10			
7/25	" " " " "	40	1.10			
8/8	" " " " "	40	1.10			
6/15/04	Canton Coal Co., Canton, Ills.	50	1.10			
8/13	" " " " "	100	1.10			
4/7/05	" " " " "	50	1.06			
5/5	" " " " "	101	1.06			
7/19	" " " " "	50	1.06			
8/17	" " " " "	50	1.06			
9/9	" " " " "	75	1.06			
7/24	" " " " "	25	1.06			
8/29	" " " " "	50	1.06			
12/1/03	Canton Union Coal Co., Canton, Ills.	10	1.20			
7/25/05	" " " " " "	25	1.10			
2/16/05	Capitol Coal Co., Springfield. Ill.	50	1.05		39	
6/16/05	Chic-Harrin Co., Herrin, Ill.	47	1.05			
4/5/05	Collier Co.-Oper. C. Co., Peoria, Ills.	10	1.10			8799
5/20/04	Crescent Coal Co., Lakonta, Iowa	100	1.25			
7/15/04	Donk Bros. C.& C. Co., St. Louis, Mo.	800	1.02½			
7/18	" " " " "	700	1.02½		6	
8/23	" " " " "	900	1.02½			
5/21	" " " " "	50	1.07½		50	
9/7	" " " " "	800	1.02½			
9/16	" " " " "	800	1.02½			
10/4	" " " " "	1000	1.02½			
10/27	" " " " "	1500	1.02½			
12/10	" " " " "	1000	1.05			
12/20	" " " " "	1000	1.05			
1/24/05	" " " " "	1000	1.05			
4/4	" " " " "	1000	1.00		18	
4/27	" " " " "	1000	1.00		102	
5/13	" " " " "	1000	1.00			
7/3	" " " " "	800	1.00			
7/27	" " " " "	800	1.00			
8/4	" " " " "	800	1.00			
8/29	" " " " "	50	1.00			
8/31	" " " " "	1000	1.00		657	

8800 *Plaintiff's Exhibit 1434*

	2/22	" " " " "	1500	1.05	
	4/29/05	Doring Coal Co., Peoria, Ills.	10	1.10	7
	4/16	Edwardsville Home Trde. Co. Edwardsville, Ills.	25	1.20	3
	11/18/04	Fair Oaks Coal Co., Peoria, Ills.	30	1.15	
	10/10/04	Foley, W. E., Peoria, Ills.	100	1.10	
	11/26	" " " "	100	1.10	
	2/11/05	" " " "	200	1.10	
	7/17	" " " "	100	1.05	44
	1/21/05	Gablehausen, G. E., Peoria, Ills.	10	1.15	4
	3/29	" " " "	10	1.10	6
	8/27/04	Gapen, T. E. & Co., Sparland, Ills.	12	1.10	
	10/26	" " " "	15	1.10	
	12/30	" " " "	40	1.10	
	9/11/05	" " " "	20	1.10	
	3/7/05	Grt. Northern Fuel Co., Novinger, Mo.	350	1.15	
	6/8	" " " " " "	800	1.15	19
	8/19	" " " " " "	900	1.15	
8801	5/4	Hess, Geo., Peoria, Ills.	2	1.10	
	10/10/04	Hibbard & Snedden C. Co., Peoria, Ills.	65	1.15	
	11/15	" " " " "	8	1.15	
	3/29/05	" " " " "	10	1.10	
	5/5	" " " " "	15	1.10	
	11/20/03	Howarth & Taylor, Edwards, Ills.	30	1.20	
	3/17/04	" " " "	30	1.20	
	7/1	" " " "	220	1.10	
	7/29	" " " "	300	1.10	
	Sept. 17	" " " "	100	1.10	
	10/7/04	" " " "	15	1.10	
	12/14	" " " "	10	1.10	
	1/4/05	" " " "	10	1.10	
	5/16/04	Indiana Bit. Coal Co., Terre Haute, Ind.	800	1.16	
	2/19/05	Indiana Bit. Coal Co., Terre Haute, Ind.	500	1.05	
	5/8	Kanne Bros., E. Peoria, Ills.	2	1.15	
	5/16	" " " "	5	1.10	
	6/13	" " " "	10	1.15	
	7/19	McCoy Co., Jas., Peoria, Ills.	5	1.00	
	8/17	" " " "	5	1.00	
8802	10/13/04	McLeon Ctg. C. Co., Bloomington, Ills.	15	1.00	
	11/15	McLean Ctg. C. Co., Bloomington, Ills.	20	1.00	
	1/3/05	McLean Ctg. C. Co., Bloomington, Ills.	20	1.00	
	7/7	Manhattan Coal Co., E. Peoria, Ills.	10	1.05	5
	11/17/03	Maplewood Coal Co., Peoria, Ills.	100	1.10	
	12/6/04	" " "	50	1.10	
	1/2/05	" " "	50	1.10	
	1/31	" " "	200	1.10	
	3/27	" " "	400	1.10	
	5/8	" " "	50	1.00	
	5/10	" " "	480	1.00	
	5/16	" " "	180	1.00	
	3/29	Martin P, Peoria, Ills.	2	1.10	
	4/24	" "	1	1.10	
	5/4	" "	10	1.10	
	7/7	Meek Coal Co., Marrissa, Ills.	100	1.05	
	7/5/04	Mo. & Ills. Coal Co., St. Louis, Mo.	50	1.15	
	3/9	" " "	400	1.15	

Plaintiff's Exhibit 1434 8803

3/25	" " "	800	1.15		
7/11/05	Monarch Coal Co., Farmington, Ills.	200	1.05	1 } 161 }	
11/26/04	Morgan Valley C. Co., Morgan Valley, Ia.	25	1.50		
1/31/05	Morgan Valley C. Co., Morgan Valley, Ia.	200	1.30		
1/31	Morgan Valley C. Co., Morgan Valley, Ia.	200	1.30		
1/3	Morgan Valley C. Co., Morgan Valley, Ia.	100	1.50		
11/20/03	Petersburg C. & Mg. Co., Petersburg, Ills.	20	1.17½		
9/6/04	Peoria Arms Co., Peoria, Ills.	25	1.10		
9/21	" "	50	1.10		
5/23/05	Reeve & Galloway, Glasford, Ills.	10	1.15		
6/9	" "	10	1.15		
12/1/03	Reents, A. & Bros., Kramms, Ills.	300	1.17½		
12/16	" " "	11	1.17½		8804
12/19	" " "	50	1.17½		
12/31	" " "	51	1.17½		
1/14/04	" " "	40	1.17½		
2/1	" " "	30	1.17½		
3/31	" " "	50	1.17½		
4/20	" " "	50	1.17½		
4/21	" " "	70	1.17½		
5/18	" " "	44	1.17½		
6/30	" " "	50	1.17½		
7/26	" " "	65	1.17½		
7/28	" " "	50	1.17½		
8/28/04	" " "	100	1.17½	50	
9/1	" " "	50	1.17½		
10/	" " "	80	1.17½		
11/18	" " "	115	1.17½		
1/4/05	" " "	78	1.17½		
2/1/05	" " "	10	1.05		
8/1/04	Roanoke C. & Mg. Co., Pekin, Ills.	100	1.20		
3/7/05	Rombauer C. Co., Novinger, Mo.	100	1.15		
5/4/05	Sholl Bros., Bartonville, Ills.	25	1.10		
5/23/05	Sanders D. T., Glasford, Ills.	10	1.10		
6/13	" "	20	1.10		8805
7/7	" "	10	1.10		
7/27	" "	50	1.10		
5/31	Sangamon Coal Co., Springfield, Ills.	20	.98		
6/21	" "	400	.98		
8/29	" "	50	.98		
10/1/04	Snider, W. J., Canton, Ills.	10	1.15		
12/15/04	S. E. Iowa C. & Mg. Co., Hamilton, Ia.	25	1.50		
1/13/05	S. E. Iowa C. & Mg. Co., Hamilton, Ia.	50	1.50		
4/26	S. E. Iowa C. & Mg. Co., Hamilton, Ia.	375	1.20		
2/6/05	South Mountain C. Co., Petersburg, Ills.	50	1.10		
3/2	South Mountain C. Co., Petersburg, Ills.	60	1.10		
1/21/05	Standard Coal Co., E. Peoria, Ills.	10	1.15		
4/12/04	Standard Co-Oper C. Co., Canton, Ills.	25	1.15		
5/16	" "	25	1.15		
7/25	" "	25	1.15		

8806 *Plaintiff's Exhibit 1434*

9/23/04	"	"	25	1.15	
10/26	"	"	25	1.15	
11/18	"	"	50	1.15	
1/18/05	"	"	25	1.15	
2/17	"	"	25	1.15	
5/8	"	"	24	1.15	
6/16	Taylor Jos. Coal Co., St. Louis, Mo.		100	1.00	
12/14/04	Thomas Coal Co., Evansville, Ind.		400	1.12½	
4/26/05	"	"	400	1.12½	
3/16/05	Trutter Coal Co., Pleasant Plains, Ills.		100	1.10	
1/19/05	Walker, Isaac W., Peoria, Ills.		4	1.10	
8/14	Waite, Jas., Peoria, Ills.		2	1.25	Donation 2
11/1/04	Wantling & Bardette, Pottstown, Ills.		20	1.15	
12/10	"	"	10	1.15	
1/21/05	"	"	12	1.15	
3/15	"	"	10	1.15	
10/31/04	Wantling I. & Co., Peoria, Ills.		60	1.10	
8807 10/22/04	Wilmington Star M. Co., Coal City, Ills.		800	1.10	
4/5/05	Winters Coal Co., Peoria, Ills.		20	1.05	
4/23	"	"	200	1.02	
8/30	"	"	400	1.05	

8808

Plaintiff's Exhibit 1435.

BUCKEYE POWDER COMPANY.
TRANSCRIPT OF ACCOUNTS AND ENTRIES RELATIVE TO SALE OF PLANT AND INVENTORY.

Plant a/c (folio 60 Exhibit P 73.)

1908					1908				
Dec. 16	Cy. Sundries to date	101-3	1,169.00		Sept. 19	Proceeds Invty. to F. W. Olin	100	5,504.08	
16	To close Sundry a/cs	J 138	147,391.53		Sept. 29	Ck 778 ret'd & cancelled,	100	100.00	
1909					1909				
Aug. 17	Cy. sunds to date	105	1,852.26		Apr. 7	Ck. 832 "	104	25.00	
17	To close Petty Cash a/c	105	50.00		7	Int. & fees W. H. Barrett note	104	35.90	
31	To close Rep. Smo. P. Co.	J 140	69.37		17	Bal. of a/c Stuber & Kuck	J 140	893.31	
31	To close doubtful a/cs	J 140	3,247.38		Aug. 31	Balance R. S. W. a/c	J 140	549.95	
31	Interest Mchts. Natl. Bk.	107	632.13		31	Proceeds mill sale,	J 141	50,000.00	
31	Interest L. E. Miller	107	1,136.68		31	Cash " " "	106	25,000.00	
31	Interest U. S. B. & T. Co.	107	1,597.58					($82,108.24)	
31	Atty. fees Barrett note	105	48.59					pencil total	
			(157,194.52)						
			pencil total						

(Exhibit P 60—folio 100)

Cash Dr.

1908	Name	Folio	General Ledger	Net Cash.
	Proceeds Invty.			
Sept. 19	Plant Sold F. W. Olin	60	$5,504.08	5,504.08

(folio 106)

1908				
Sept. 19	Plant a/c Cash—Sale of mills	60	$25,000.00	25,000.00

Journal (Exhibit P 58—folio 141)

Accts. Payable	Genl. Ledger	Accts. Recble.	Date	Account	Folio	Accts Recble.	Genl. Ledger	Accts Payable
	$50,000.00			Bills Rec.	23			
				Plant a/c	60		$50,000.00	
				Proceeds of sale of mills 2—notes 25,000.00 each dated Sept. 19/08				

8811 8810 8809

2937

Plaintiff's Exhibit 1435

BUCKEYE POWDER COMPANY.

TRANSCRIPT OF ACCOUNTS AND ENTRIES RELATIVE TO SALE OF PLANT AND INVENTORY (cont'd)

Journal (Exhibit P 58—folio 138).
Month of December 1908

Accts. Payable	Genl. Ledger	Accts. Recble	Date	Accounts	Folio	Accts. Recble	Genl. Ledger	Accts. Payable
	$147,391.53			Plant a/c to Sundries	60			
				To close all accounts except Profit & loss into Plant a/c				
				Powder	47		$5,665.76	
				Soda	51		4,320.60	
				Charcoal	17		183.86	
				Sulphur	16		558.21	
				Interest	9		113.66	
				Real Estate	10		5,450.00	
				Improvement	11		44,707.29	
				Construction	12		64,519.37	
				Boarding House	13		3,167.07	
				Office & Mill Furniture	14		542.21	
				Insurance	15		336.77	
				Soda Sacks	18		59.28	
				Keg a/c	20		2,360.11	
				Fuse	21		84.67	
				Bills Receivable	23		1,631.93	
				Suspense	24		4,031.56	
				Discount	31		442.96	
				Salary	32		5,458.36	
				Taxes	33		384.96	
				Oils	39		18.01	
				Graphite	40		128.61	
				General Expense	45		2,137.82	
				Manufacturing Expense	49		256.32	
				Cash Sales	53		6.20	
				Fuel a/c	55		203.67	
				Freight	57		622.27	

Plaintiff's Exhibit 1435

Plaintiff's Exhibit 1436.

TRANSCRIPT OF PROFIT & LOSS ACCOUNT. Exhibit P 71

1904				1903				
June 30	Sunds. lost in explosion	J 57	327.12	Dec. 31	Mfg.—Gain to Jan. 1st 04	24	1161.19	
" 30	Expenses & settlements "	" 58	802.65	June 30	" Gain to July 1, 1904		4998.19	
" 30	Balance		5029.61					
			6159.38				6159.38	
1905				1904				
Dec. 31	To Mnfg.	J 232	10799.28	July 1	Net Gain		5029.61	
				Dec. 31	" "	J 115	7652.03	
	Balance		11994.41	1905				
				June 30	" "	J 169	10112.05	
			22793.69				22793.69	
1905				1906				
Dec. 31	Correction inventory powder	J 233	2901.05	Jan. 1	Balance		11994.41	
31	Star Coal Co. freight	" 233	56.10	1905				
31	Monarch Coal Co. pwd rtd	" 234	3.00	Dec. 31	Insurance inventory	J 233	480.00	
31	Randolph Macon C. Co.	" 234	756.33	31	Sangamon Coal Co. freight	" 233	6.38	
31	Tax Reserve	" 234	242.93	31	Waddell & Gentien	" 233	95.31	
31	Sundry Accts. corrections	" 234	3652.99	31	Sulphur inventory	" 234	271.14	
31	Boarding House acct.	" 235	162.92	31	Sundries to close	" 234	12.02	
31	Reserve Casualty, Plant & Personal	" 235	1252.60	31	Boarding House Invt. Furn. etc.	" 235	200.00	
31	Accts Payable to correct	"	2695.07					
31	Hutchinson Bros. frt. 1905	J 236	6.90					
31	Freight—deductions 1905	J 236	880.26					
31	Corrections C. Book	135	296.92					
31	" a/c Rec.	J 236	276.41					
			13183.48		134.22			

8817 8818 8819

Plaintiff's Exhibit 1436 2989

Plaintiff's Exhibit 1437.

RESUME OF BUCKEYE POWDER COMPANY.

			800 Kegs	400 Kegs
East of Mississippi River—	106,502 Kegs,	Buckeye Freight	.0688	.1058
" " "		Our freight	.0525	.0821
	Difference in our favor		.0163	.0237
West of Mississippi River—	138,180 Kegs,	Buckeye Freight	.1236	
		Our freight	.1092	
	Difference in our favor		.0144	

Do not understand from the attached statement that the competitive company is actually selling the number of kegs shown opposite customers' names.

These figures represent customers' consumption, and are used for the purpose of comparison of freight expense as between our mills and competitors' mills.

As an illustration, we mention the Whitebreast Fuel Co. who have secured a small lot of competitive powder. We are still selling this company and expect to retain the business.

This statement does, however, represent the names of the parties with whom competitive powder has been placed.

KENTUCKY. BUCKEYE POWDER COMPANY.

Name	Location	Annual Consumption	Competitive Price	Competitive Freight	Our Price	Our Best Freight	Remarks
Thomas Coal Co.	Morganfield, Ky.	1,200	$1.125	.63 .69 .173 .189	....	.47 .49 .129 .134	Poor credit
Eastern Freestone Co.	Freestone, Ky.	120	....	.60 .66 .165 .181	1.50	.42 .42 .115 .115	
Rowan Co., Freestone Co.	Farmer, Ky.	360	1.225	.62 .68 .17 .187	....	.42 .42 .115 .115	Buy thro' Thos. Henderson & Son, Ashland, Ky.
Bell Union Coal & Coke Co.	DeKoven, Ky.	600	1.50	.63 .69 .173 .189	$1.25	.47 .49 .129 .134	
TOTAL		2,280	AVERAGE	.172 .189		.128 .1304	

BUCKEYE POWDER COMPANY

St. Louis District.

Name	Location	Annual Consumption	Competitive Price	Competitive Freight	Our Price	Our Best Freight	Remarks
Brechnitz	Belleville, Ill.	19,250	....	.24 .39 .066 .107	....	Team 3½c	Interested in Buckeye
Summit Coal & M. Co.	"	3,600	$1.175	.24 .39 .066 .107	$1.10	"	
Little Oak Coal Co.	"	4,800	1.20	" "	1.15	"	
Willis Coal & M. Co.	Percy, Ill.	12,000	.95	.33 .58 .09 .159	1.00	.18 .25 .049 .068	Contract with Buckeye
" " "	Willieville, Ill.	8,400	.95	.38 .59 .104 .162		.23 .30 .063 .082	
Donk Bros. C. & C. Co.	Donkville, Ill.	18,000	....	.319 .469 .087 .129	1.10	.229 .249 .063 .068	Miami
" " "	Troy, Ill.	7,200	....	.319 .435 .087 .119	1.10	.249 .365 .068 .10	"
Oak Hill Coal Co.	Belleville, Ill.	960	1.20	.24 .39 .066 .107	1.15	Team 3½c	
Gus Blair Big Muddy C. Co.	Murphysboro, Ill.	480	1.15	.415 .515 .114 .141	1.15	.18 .25 .049 .068	
Lenz Coal Co.	Shiloh, Ill.	1,500	1.15	.25 .35 .068 .096	1.15	Team 3½c	
Ill. Hydr. Pressed Brick Co.	Cantine, Ill.	1,200	1.10	.35 .47 .096 .129	1.20	.26 .39 .071 .107	Expect to hold.
Marissa Coal & M. Co.	Marissa, Ill.	2,400	1.10	.30 .65 .082 .178	1.05	.22 .30 .06 .082	

BUCKEYE POWDER COMPANY.

St. Louis District.

Name	Location	Annual Consumption	Competitive Price	Competitive Freight	Our Price	Our Best Freight	Remarks
T. M. Meek Coal Co.	White Oak, Ill.	300	....	.28 .50 .077 .137	$1.15	.18 .24 .049 .066	
James Taylor	Belleville, Ill.	....	$1.25	.24 .39 .066 .107	1.35	Team 3½c	We are selling him through Hucke
L. Senior	Belleville, Ill.	960	1.15	.24 .39 .066 .107	....	Team 3½c	
Banner Clay Works	Edwardsville, Ill.	360	1.125	.15 .25 .041 .068	1.35	.255 .275 .07 .075	Equitable
Grandville Supply Co.	Grandville, Ill.	5,000	....	.15 .47 .041 .129	....	.15 .47 .041 .129	Buckeye sold 1200 kegs in March
TOTAL		86,412	AVERAGE	.076 .121		.047 .057	

BUCKEYE POWDER COMPANY. Wyoming.

Name	Location	Annual Consumption	Competitive Price	Competitive Freight	Our Price	Our Best Freight	Remarks
Carney Coal Co.	Sheridan, Wyo.	4,800	$1.65	.618	$1.65	.591	Contract with Buckeye expires in Aug. Will then confer with us.
Lord & Poll	Sheridan, Wyo.	2,000	$1.65	.618	$1.65	.591	Will confer with us when in market next Fall.
TOTAL		6,800	AVERAGE	.618		.591	

BUCKEYE POWDER COMPANY. IOWA.

Phillips Fuel Co.	Ottuma, Ia.	12,000	$1.125	.20 .51 .055 .14	$1.125	.19 .22 .052 .06	Bought one Buckeye fc We have since closed contract
Morgan Valley Coal Co.	Morgan Valley, Ia.	800	1.20	.40 .58 .11 .159	1.35	.275 .375 .075 .103	Credit bad
LeClaire Stone Co.	LeClaire, Ia.	2,000	1.08	.265 .365 .072 .10	1.35	.263 .335 .072 .092	Miami
C. Bailey	Frazier, Ia.	1,600	1.30	.40 .72 .11 .198	1.15	.487 .595 .133 .163	Expect to secure next order
Lost Creek Coal Co.	Eddyville, Ia.	5,000	1.10	.30 .50 .083 .137	1.10	.205 .235 .056 .064	Bought 1 car Buckeye. We have since closed contract
Dunreath Coal Co.	Dunreath, Ia.	12,000	....	.30 .58 .082 .159	1.35	.36 .46 .099 .1265	Credit bad
Rascher-Schricker & R. H. Co.	Davenport, Ia.	1,200	1.20	.265 .365 .072 .10	1.35	.15 .365 .041 .10	Connected with Abel Lime & Cement Co. Miami customer.
Drake Hdwe. Co.	Burlington, Ia.	300	1.15	.15 .37 .041 .101	1.35	.15 .20 .041 .055	
Abel Lime & Cement Co.	Bettendorf, Ia.	1,800	....	.268 .364 .073 .10	1.35	.15 .364 .041 .10	Miami
Whitebreast Fuel Co.	Albia, Ia.	28,000	....	.25 .58 .068 .159	1.00 F. O. B. Mooar	.216 .256 .059 .07	Testing 25 kegs Buckeye. We expect hold trade
TOTAL		64,700	AVERAGE	.044 .149		.066 .082	

8829 8828 8827

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Plaintiff's Exhibit 1437

8832 8831 8830

Plaintiff's Exhibit 1437

2944

Cincinnati District

BUCKEYE POWDER COMPANY. OHIO.

Name	Location	Annual Consumption	Competitive Price	Competitive Freight	Our Price	Our Best Freight	Remarks
The Globe Iron Co.	Jackson, Ohio	....	$1.10	.39 .45 .107 .123	$1.10	.19 .23 .052 .063	Promised us next order
Nelsonville Brick Co.	Nelsonville, O.	1,200	....	.35 .49 .096 .134	1.025	.25 .30 .068 .082	Same as Nelsonville Sewer-pipe Co.
W. A. Murdock	Ironton, O.	2,400	1.05	.39 .45 .107 .123	$1.05	.135 .135 .037 .037	We are promised next order.
Chas. G. Sheppard	Nelsonville, O.	1,200	1.20	.35 .49 .096 .134	1.35	.25 .30 .068 .082	Buy thro Nelsonville S. P. Co.
Hanging Rock Iron Co.	Hanging Rock, O.	720	1.25	.39 .45 .107 .123	$1.10	.135 .135 .037 .037	Buy thro Murdock, Ironton.
New York Coal Co.	Floodwood, O.	1,200	1.10	.39 .45 .107 .123	1.07	.25 .30 .068 .082	Miami @ $.05
Mike Riley	Centre Station, O.	600	1.20	.31 .36 .085 .099	1.35	.21 .21 .057 .057	Buy thro Murdock, Ironton.
E. B. Willard & Co.	Bartles Station, O.	960	....	.39 .45 .107 .123	1.35	.21 .21 .057 .057	Buy thro Murdock, Ironton.
Nelsonville S. P. Co.	Nelsonville, O.	3,000	1.05	.35 .49 .096 .134	1.025	.25 .30 .068 .082	Have since secured this.
J. M. Lama	"	4,800	1.05	" "	1.025	" "	" " " "
TOTAL		14,880	AVERAGE	.100 .128		.061 .0706	

Plaintiff's Exhibit 1437

St. Louis District — BUCKEYE POWDER COMPANY. — Missouri.

Name	Location	Annual Consumption	Competitive Price	Competitive Freight	Our Price	Our Best Freight	Remarks
Northwestern C. & M. Co.	Bevier, Mo.	12,000	....	.45 .59 .123 .162	$1.10	.34 .60 .093 .163	Contract with B. P. Co. Expect to secure.
Bevier Coal Mng. Co.	" "	12,000	....	" "	1.10	" "	May secure
Vanderhoof & Co.	Birmingham, Mo.	1,200	$1.35	.55 .70 .151 .192	1.25	.45 .60 .123 .165	Expect to secure next order.
Randolph-Macon C. Co.	Elliott, Mo.	20,000	....	.71 .81 .195 .222	1.10	.41 .46 .112 .126	B. P. Co. sold 2400 kegs since Feb. 25—05.
Huntsville Gas & E. L. Co.	Huntsville ,Mo.	180	1.60	.43 .57 .118 .156	1.35 St. Louis	.38 .49 .104 .134	Buy thro' Wabash Coal Co.
Wabash Coal Co.	" "	12,000	....	" "	1.10	" "	Contract with B. P. Co.
F. C. Semple	" "	300	1.40	" "	1.25	" "	
L. J. Smith	Kansas City, Mo.	800	1.25	.55 .70 .151 .192	1.15 L.C.L.	.35 .49 .096 .134	Cerberite has preference
G. M. Boyd	Knocnoster, Mo.	....	....	.59 .84 .162 .231	1.35	.59 .96 .162 .262	B. P. Co. sold 25 kegs
Cerberite Pdr. Mfg. Co.	Lambert, Mo.	7,000 Est.	....	.62 .72 .17 .198	....	.35 .49 .096 .134	B. P. Co. since Dec. sold 2400 kegs.
Samuels & Homes Cons. Co.	Westport, Mo.	1,200	....	.55 .70 .151 .192	1.20 L.C.L. Kan. City	.35 .49 .096 .134	Have secured trade
TOTAL		66,680	AVERAGE	.15		.102	

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Chicago District—3 BUCKEYE POWDER COMPANY. Illinois.

Name	Location	Annual Consumption	Competitive Price	Competitive Freight	Our Price	Our Best Freight	Remarks
Forward—		41,070					
O'Connell Bros.	Danville, Ill.	1,800	....	.22 .30 .06 .082	$1.35	.17 .22 .046 .06	
Phoenix C. & M. Co.	Cornell, Ill.	1,200	$1.35	.25 .31 .068 .085	C.L. 1.20 L.C.L. 1.35	.15 .44 .041 .121	Expect to secure
J. Buckley	Coal Valley, Ill.	1,200	....	.15 .268 .041 .073	1.35	.15 .47 .041 .129	Selling thro' Knapp & Lees
Chgo. & N. W. Ry. Co.	Chicago, Ill.	960	....	.15 .40 .041 .11	1.20 F.O.B. Ple. Prar.	.15 .15 .041 .041	
Andrew Verino	Carbon Hill, Ill.	800	....	.15 .40 .041 .11	1.35	.15 .47 .041 .129	
Canton Coal & Mng. Co.	Canton, Ill.	....	....	.15 .225 .041 .61	1.35	.15 .37 .041 .101	Poor credit
Standard Coal Co.	" "	800	....	" "	....	" "	
W. E. Shepard & Co.	Braceville, Ill.	....	....	.15 .47 .041 .129	1.35	.15 .47 .041 .129	77 Buckeye and C. L. Austin—March.
McLain Co. Coal Co.	Bloomington, Ill.	300	1.10	.235 .29 .064 .079	1.35 L.C.L.	.18 .47 .049 .129	
Black Diamond Coal Co.	Auburn, Ill.	4,800	1.05	.29 .347 .079 .095	1.10	.28 .47 .077 .129	1000 Buckeye—March expect to hold.
TOTAL		52,930	AVERAGE	.048 .094		.055 .111	

Plaintiff's Exhibit 1487

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BUCKEYE POWDER COMPANY

Name	Location	Annual Consumption	Competitive Price	Competitive Freight	Our Price	Our Best Freight	Remarks
C. F. Keeler Coal Co.	Atherton, Ind.	1,800 Kegs	$1.10	.27c .315 .074 .083	$1.10	.17c .22 .046 .06	Interested in B. P. Co.
Cloverland C. & M. Co.	Cloverland, Ind.	3,000 "	1.00	.27 .315 .074 .083	1.05	.16 .18 .044 .049	" "
Thomas Coal Co.	Evansville, Ind.	2,400 "	1.25	.34 .40 .093 .11	....	.22 .25 .06 .068	Poor credit.
Ind. Bituminous C. Co.	Turner, Ind.	1,800 "	1.10	.27 .315 .074 .086	1.05	.16 .18 .044 .049	Interested B. P. Co.
Deering Coal Co.	Westville, Ill.	25,000 "	1.00	.22 .30 .06 .082	1.05	.20 .47 .055 .129	
Powers & Williams	Streator, Ill.	6,000 "	1.10	.15 .15 .041 .041	1.10	.15 .15 .041 .041	We get about half this business Buckeye getting the other half.
TOTAL		40,000	AVERAGE	.061 .077		.051 .099	

Chicago District. BUCKEYE POWDER COMPANY. Illinois.

Name	Location	Annual Consumption	Competitive Price	Competitive Freight	Our Price	Our Best Freight	Remarks
Wenona Coal Co.	Wenona, Ill.	....	....	.15 .463 .041 .127	$1.35	.18 .47 .049 .129	24 Kegs Buckeye in March.
J. D. Paulo	Toulon, Ill.	....	....	.15 .47 .041 .139	1.35	.15 .47 .041 .129	200 Buckeye—March. Financially weak.

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Plaintiff's Exhibit 1437

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& Williams	Streator, Ill.	3,000	....	.15 .15 .041 .041	1.10	.15 .15 .041 .041	We get half of this business.
r Clay Mfg. Works	" "	600	....	" "	1.35	" "	
Coal Co.	Springfield, Ill.	7,200	....	.15 .319 .041 .087	1.10	.20 .47 .055 .129	50 Buckeye—March—Gif
Bros.	S. Wilmington, Ill.	....	....	.15 .37 .041 .101	1.35	.15 .47 .041 .129	25 Buckeye—March
y Coal Co.	Sherman, Ill.	6,000	....	.16 .464 .044 .127	1.10	.20 .47 .055 .129	10 Buckeye—April—Gif
d Coal Co.	Rutland, Ill.	....	....	.15 .464 .041 .127	1.35	.18 .47 .049 .129	Belongs to Peabody of Egyptian
Page	Rockford, Ill.	400	$1.00	.15 .40 .041 .11	1.10.	.15 .47 .041 .129	
Lake Coal Co.	Bissell, Ill.	....	....	.15 .338 .041 .093	1.35	.20 .47 .055 .129	400 Buckeye—March.
ester Coal Co.	Petersburg, Ill.	....	....	.16 .46 .044 .126	....	.28 .47 .077 .129	200 Buckeye—March.
ountain Coal Co.	" "	3,000	....	" "	1.10	" "	60 Buckeye—March.
n & Johnston	" "	....	....	" "	1.35	" "	50 Buckeye—March—Gift.
tone-Refior H. Co.	Ottawa, Ill.	450	....	.20 .51 .055 .14	1.35	.193 .238 .053 .059	
		20,650					

Name	Location	Annual Consumption	Competitive Price	Competitive Freight	Our Price	Our Best Freight	Remarks
	Forward	20,650					
Cusack & Edwards	Oak Hill, Ill.	....	....	.21 .39 .057 .107	$1.35	Team 3½c	
William Sutton	Minonk, Ill.	120	....	.15 .47 .041 .129	1.35	.15 .47 .041 .129	
F. W. Moore	Middlegrove, Ill.	240	....	.15 .225 .041 .061	1.35	.15 .47 .041 .129	Financially weak
W. E. Foley	Mapleton, Ill.	2,000	....	.15 .169 .041 .046	1.10	.15 .47 .041 .129	
Kewaunee C. & Mng. Co.	Kewaunee, Ill.	960	$1.10	.15 .37 .041 .101	1.10	.15 .37 .041 .101	
H. A. Tadfore	Kangley, Ill.	....	....	.15 .47 .041 .129	1.35	.15 .47 .041 .129	50 Kegs Buckeye
Barrett Hdwe. Co.	Joilet, Ill.	800	1.15	.15 .40 .041 .11	1.10	.27 .315 .074 .086	March
Bruce & Burdick	Joilet, Ill.	1,200		" "	1.10	" "	
Greenview Coal Co.	Greenview, Ill.	4,800	....	.16 .45 .044 .123	1.10	.28 .47 .077 .129	
Jno. O'Connell C. Co.	Grape Creek, Ill.	1,800	....	.34 .40 .093 .11	1.10	.28 .47 .077 .129	
Green River Coal Co.	Girard, Ill.	....	....	.15 .47 .041 .129	1.35	.15 .47 .041 .129	40 Buckeye March
Churchill & Hemenway	Galesburg, Ill.	1,500	1.10	.15 .47 .041 .129	....	.15 .37 .041 .101	"American"
Maplewood Coal Co.	Farmington, Ill.	6,000	....	.15 .206 .041 .056	1.10	.15 .37 .041 .101	858 Kegs Buck- eye since Dec.
Leslie Kramm	Edwards, Ill.	1,000	....	.15 .37 .041 .101	....	.15 .37 .041 .101	
		41,070					

Plaintiff's Exhibit 1437
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8848 **Defendant's Exhibit A-167.**

THIS CONTRACT, made between the Buckeye Powder Company of Peoria, Illinois, first party, and
of second party.

WITNESSETH: That first party hereby sells, and second party buys, all the Black Blasting Powder, in kegs twenty-five (25) pounds each, required for use in the mines owned or controlled by second party as noted below, for the period of
from this date, at the current carload price established by the first party, at the location named,
8849 at the time of receipt of order, the present carload price being $1.35 per keg.

The following conditions are mutually accepted:

(a) First party agrees to allow second party a rebate of 15c. per keg on powder purchased on this contract.

(b) First party agrees to allow second party the actual carload freight charges from shipping to delivery point.

(c) Terms are 60 days, or two per cent. (2%) discount for cash if remitted within ten (10) days from date of invoice.

(d) Second party agrees to buy from first party
8850 in carload lots of 400 kegs of 25 lbs. each, all the Black Blasting Powder required by it for the following mines:

NAME
LOCATION.
or for any other mines that may be acquired by the second party, in the same district, during the time of this contract.

(e) It is agreed that powder furnished under this contract is for consumption of the second party only, and not for sale, except to its own miners or employees. It is agreed that a violation of this

Defendant's Exhibit A-167. 8851

clause gives to first party the option of cancellation of this contract.

(f) The first party may furnish, and the second party will accept under this contract, powder of any standard brand, make and quality.

(g) The first party is not to be responsible for delays caused by strikes, accidents, or causes beyond its control.

Dated at , , 190

By

BUCKEYE POWDER COMPANY.

By

8852

Defendant's Exhibit A-207.

Copy.

Peoria, Ill., Oct. 19, 1903.

Hon. Geo. B. Cortelyou,
Washington, D. C.

Dear Sir:

For 21 years I was with the powder association and on Feby. 1, 1903, resigned as General Sales Agent for the U. S. of the Du Pont, Hazard and allied companies to establish a small business that is not associated. It was our hope that we would be permitted to peacefully conduct our affairs, but we are constantly harrassed and assailed by a tribe of detectives, paid spies and shyster lawyers, who are employed and directed by the Du Pont company. My home was at Wilmington, Del., and I am thoroughly familiar with all the details of the powder and dynamite associations, both of which are conducted in rank violation and defiance of the national and state statutes and compared with which the Beef Trust is angelic. 8853

I have been a Republican for 30 years and was engaged in journalism, the practice of law and lat-

8854 *Defendant's Exhibit A-207*

terly in the powder business. Mr. Roosevelt's idea that giving publicity to Trusts would control their evil effects is correct if practically applied and particularly with the unlawful organizations, or pools, that form conspiracies to destroy competitors.

It is but fair to submit this subject in detail to your Department, if it is desired, preliminary to the full discussion that will be given it in press and pamphlet form during 1904. Associated with this company are several stockholders, prominent in political and financial circles, all of whom resent
8855 the ill-advised and unscrupulous methods of the Wilmington outfit.

I am in position to furnish you sufficient proofs, written and oral, to abate these illegal organizations.

I have no desire to assume the role of a reformer and have refrained from presenting this matter until it has become a necessity in defense of our business. Now we shall exhaust every honorable means at our command, and we submit the matter to your Department.

As this is in the nature of a public paper, I have taken the liberty of submitting a copy to Hon. Ed-
8856 ward Addicks, who may feel some personal interest in the appeal of a late citizen of Delaware and lend his encouragement.

Will you kindly advise if we can depend upon your Department to investigate and apply the best remedy to this evil? We reserve the right to take up the question through State officials and the Courts, for I have not lost faith in the judiciary of the country.

I will be pleased to furnish you references to business men, commercial bodies and bankers, who have known my character for 20 years.

Truly yours,

W/AM President.

Defendants' Exhibit A-212.

CENTRAL COAL AND MINING CO. 8857

Miners and Shippers of

BITUMINOUS COAL.

Operating Mines in Fulton County, Ill.

General Offices, Kewanee, Illinois.

Kewanee, Ill., Sept. 3, 1903.

Buckeye Powder Co.,
Peoria, Ill.

Gentlemen:—

We herewith propose to purchase from you such blasting powder as we may require during the coming year in our mine at East Bryant, Fulton County, Ill., or in such additional mines as we may open or acquire in that vicinity, to the extent of one-half of our actual requirements; you extending to us, however, the privilege of ordering from you our full yearly requirements, which we estimate at about 6,000 kegs. 8858

The price of the above will be $1.10 per keg, F.O.B., C.B. & Q. tracks, at your mill in Peoria.

Terms, 60 days or 2% discount for cash if remitted in 10 days from date of invoice.

Such powder as you furnish us is to be for our own requirements unless otherwise specially agreed and of such quality as to be acceptable and satisfactory for our work. 8859

Should you make a reduction during the year in the present regular price, which we understand to be $1.35 per keg, you are to reduce your price to us proportionately.

Your acceptance of the herein proposal to constitute a contract between us, the same being executed in duplicate.

Very truly yours,
CENTRAL COAL & MINING CO.,
Chas. I. Pierce, Pres.

ACCEPTED:

8860 **Defendant's Exhibit A-377.**

PROSPECTUS.

All of the powder mills in the middle western states, a territory consuming approximately 4,000,000 kegs of powder per year, are now under control of the Powder Trust, excepting one plant owned by coal operators, and the independent plant owned by Buckeye Powder Company.

Negotiations have been pending during the past three months and offers have been made for the Buckeye mills. As the largest stockholder in the
8861 Company, I am opposed to accepting the offer that has been made, and if a sale of the plant is to be effected, as now seems probable, I would prefer to see the mills pass under the control of the Coal Operators and remain independent of the Monopoly that now controls 90% of the production.

A few months ago an offer of $125,000.00 for the plant, exclusive of all stocks and materials on hand was declined by Buckeye Powder Company. It considered its plant and stocks worth $180,000.00, exclusive of the cash and book accounts of the Company.

The plant, good will, all materials and manufac-
8862 tured product on hand, being all physical assets, and exclusive of book accounts and cash can now be purchased for $125,000.00.

I propose to the Coal Operators of Illinois, Indiana, Michigan, Iowa and Missouri to organize and incorporate a company under the laws of Delaware with a full paid Capital Stock of $150,000.00. With the proceeds of said stock to purchase and take over the mills, plant and physical assets free and unincumbered of Buckeye Powder Company of Peoria, Illinois, at a total cost of equally at two and four months. The remainder $125,000.00 to be paid half cash and balance to be used as a working capital.

Defendants' Exhibit A-377

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Several Coal Operators have signified their desire to join in this enterprise.

The mills have a total capacity of 1200 kegs dialy and a nominal operating capacity fo 1000 kegs per day. The mills are favorably located and widely distributed, in separate ravines, over a large portion of 101 acres of land owned by the Company, on which there are no mortgages or encumbrances.

If desired, I will agree to operate the mills on same salary that I have received, for one year and the powder can be produced at less than 87c per keg f. o. b. mills, including all salaries and 8864
expenses. During the year my successor can be chosen and instructed, unless one of my sons, at present officers of the Company and Superintendent of the mills, shall be selected. They are fully competent.

This is the only plant that stands between the Coal Operator and much higher prices for powder. It would be a grave mistake if the Coal Operators of the Middle West permit the Buckeye plant to go under the control of the Powder Trust. There is a good revenue in powder at present prices, but a few of the smaller stockholders of the Company, who have defended it during the 8865
past four years against the Powder Trust, at very low prices, wish to retire from the business. These mills are built, have operated successfully, can produce a powder second to none in quality and the Coal Operators can now acquire them at about two-thirds their value.

Powder is essential to the mining of coal and is a considerable ite mof the expense. This is a rare opportunity for the Coal Operators to insure themselves against future extortion and to acquire a plant ready for operation, at much less than they can build one.

8866 *Defendants' Exhibit A-377*

The first thirty Operators, or less, who signify their desire to take this plant at $125,000.00 by subscribing the stock in blocks of $5000.00 each, will be accepted. The excess of $25,000.00 cash to be reserved for working capital. This tender is made confidentially to you and a few others, and if there are any special Operators to whom this offer my anot have been extended and whom you would like associated in the purchase, the invitation to subscribe will be extended to them on receipt of your advices.

8867 Subscriptions for stock should be based on the estimated requirements of powder from the mills by each stockholder.

That is: $5000.00 stock to be subscribed for each

> 10,000 kegs, or less, per year that the stockholder may expect to take from the mills, at prices fixed by the Directors of the Company, all of whom shall be Coal Operators.

The mills are open for inspection on application at the office of the Company and subscribers to this
8868 proposal are cordially invited to visit and inspect the plant.

May we count on you as one of the parties who will join in the purchase of this plant, and shall it be for one, two, or more blocks of the stock?

Very respectfully,

R. S. WADDELL.

Defendants' Exhibit A-518.

DYNAMITE

THOUSANDS ONLY
HUNDREDS OMITTED.

	1903		1904		1905		1906		1907		1908	
	Capacity	Output	Capacity	Output	Capacity	Output	Capacity	Output	Capacity	Output	Capacity	Output
Total Competitors	55,700	26,066	57,450	29,325	71,783	44,034	87,100	52,880	114,125	60,494	131,950	58,097
Total Du Pont	....	109,493	126,026	103,187	142,512	119,614	157,715	153,259	181,625	161,938	188,350	131,804
Grand Total	55,700	135,559	183,476	132,539	214,295	163,648	244,815	206,139	295,750	222,333	320,300	189,901
% Competitors	....	19.23	31.31	22.15	33.50	26.91	35.58	25.65	38.59	27.20	41.20	30.59
% Du Pont	....	80.77	68.69	77.85	66.50	73.09	64.42	74.35	61.41	72.80	58.80	69.41
	....	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00

BLACK POWDER

THOUSANDS ONLY
HUNDREDS OMITTED.

	1903		1904		1905		1906		1907		1908	
	Capacity	Output	Capacity	Output	Capacity	Output	Capacity	Output	Capacity	Output	Capacity	Output
Total Competitors	3,031	1,973	4,005	2,475	4,702	3,058	5,700	3,418	5,861	3,875	5,957	3,206
Total Du Pont	7,981	6,643	7,668	5,842	6,765	5,932	7,859	6,744	8,250	7,363	8,294	5,635
Grand Total	11,012	8,616	11,673	8,317	11,467	8,990	13,559	10,162	14,111	11,238	14,251	8,841
% Competitors	27.52	22.90	34.31	29.76	41.00	34.03	42.04	33.64	41.53	34.48	41.80	32.26
% Du Pont	72.48	77.10	65.69	70.24	59.00	65.98	57.96	66.36	58.47	65.52	58.20	63.74
	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00

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8872 **Defendants' Exhibit A-519.**

DYNAMITE.

	Capacity		Output	
1905 vs. 1904 Competitors	24.94%	Increase	50.02%	Increase
1905 vs. 1904 Du Pont	13.08%	"	23.47%	"
1906 vs. 1904 Competitors	51.66%	Increase	80.16%	Increase
1906 vs. 1904 Du Pont	25.14%	"	55.53%	"
1907 vs. 1904 Competitors	98.65%	Increase	106.10%	Increase
1907 vs. 1904 Du Pont	44.12%	"	67.90%	"
8873 1908 vs. 1904 Competitors	129.68%	Increase	97.93%	Increase
1908 vs. 1904 Du Pont	49.46%	"	43.27%	"

BLACK POWDER.

	Capacity		Output	
1904 vs. 1903 Competitors	32.13%	Increase	25.44%	Increase
1904 vs. 1903 Du Pont	03.92%	Decrease	12.06%	Decrease
1905 vs. 1903 Competitors 55.13%		Increase	54.99%	Increase
1905 vs. 1903 Du Pont	15.24%	Decrease	10.70%	Decrease
1906 vs. 1903 Competitors	88.06%	Increase	73.24%	Increase
1906 vs. 1903 Du Pont	01.53%	Decrease	01.52%	Increase
8874				
1907 vs. 1903 Competitors	93.36%	Increase	96.40%	Increase
1907 vs. 1903 Du Pont	03.37%	Increase	10.84%	Increase
1908 vs. 1903 Competitors	96.54%	Increase	62.49%	Increase
1908 vs. 1903 Du Pont	03.92%	Increase	15.17%	Decrease

Defendants' Exhibit A-524. 8875

Chicago, June 22nd, 1905.

E. I. duPont Co.,
Sales Dept., Wilmington, Del.

Gentlemen:

Kindly refer to my letter of June 19th upon the subject of Rock Island Ry. Co.'s connection with the Consolidated Indiana Coal Co., in which I further gave the make-up of the new organization.

Next read copy of letter received this morning 8876
from Pur. Agent Forbes of the Rock Island, finally, my reply thereto, and let me have your instructions as to advisability of meeting Forbes and this new consolidation half way in an effort of conciliation and trade-getting.

What would you think of a price f. o. b. rails of the Rock Island, Keokuk, Iowa, of 95c for the combined business of the interests under consideration? If this proposition meets with your favor, please advise, when I will cause to be forwarded the formal application for reduced price.

Yours truly,

E. S. Rice. 8877

Dictated
(E)
COPY

8872 8878 **Defendants' Exhibit A-525.**

Chicago, June 19th, 1905.

Mr. E. S. Rice,
Gen'l Agent, E. I. Du Pont Co.,
Masonic Temple, Chicago, Ill.

Dear Sir:

Your favor of the 10th inst.

Please allow me to thank you for your courtesy in taking up this matter of reduction in price on
8873 8879 powder with your home office and to state that I note you decline to meet the cut price of 95c.

Of course, under a contract which does not expire until Nov. 1, we are under obligations to pay you the price you are asking. However, it may interest you to know that we are losers by this contract this year, as we could, at the present time, obtain our powder at a less price than we are paying for it, all of which we have duly noted.

Yours truly,

Signed, S. F. FORBES, Pur. Agent.

8874 8880

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY. 8881

THE BUCKEYE POWDER COMPANY, a Corporation,
Plaintiff,

against

E. I. DU PONT NEMOURS POWDER COMPANY, EASTERN DYNAMITE COMPANY and INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY, Corporations,
Defendants.

Reasons on Rule Show Cause. 8882

The following are the reasons and causes upon which the plaintiff rests its motion for a new trial of the above-stated cause of action:

1.—Because the verdict in favor of the E. I. du Pont Nemours Powder Company, returned herein on the 25th day of February, 1914, is against the clear weight of the evidence. 8883

2.—Because the verdict for the Eastern Dynamite Company and International Smokeless Powder and Chemical Company returned herein on the 25th day of February, 1914, is against the clear weight of the evidence.

3.—Because said verdict rendered in favor of the E. I. du Pont Nemours Powder Company is against the law.

4.—Because said verdict in favor of the Eastern

8884 *Rule to Show Cause*

Dynamite Company and International Smokeless Powder and Chemical Company is against the law.

5.—Because the charge of the Court was erroneous in law.

6.—Because of the failure of the Court to instruct the jury on material issues in its charge to the jury.

7.—Because of the refusal of the Court to instruct the jury on material issues as requested by
8885 the plaintiff in its charge to the jury.

8.—Because the jury while deliberating upon their verdict had before them a large number of letters, files, pleadings, and other papers that were not in evidence in said case and which they examined and inspected contrary to law.

MacFARLAND, TAYLOR & COSTELLO,
TWYMAN O. ABBOTT,
WALTER J. BARTNETT,
Attorneys for Plaintiff,
Office & P. O. Address,
No. 63 Wall Street,
8886 Borough of Manhattan,
City of New York.

UNITED STATES DISTRICT COURT, 8887

DISTRICT OF NEW JERSEY.

THE BUCKEYE POWDER COMPANY against E. I. DU PONT DE NEMOURS POWDER COMPANY, *et als.*	At Law.

Rule to Show Cause why Verdict should not be 8888
set aside and a new trial granted.

An application for a rule to show cause why the verdict rendered in favor of the defendants in the above-stated cause should not be set aside and a new trial granted, having been made on behalf of the plaintiff within the time required by the rules and practice of this Court, now, upon motion of Twyman O. Abbott, Esq., counsel for said plaintiff, and upon the reasons and affidavits filed in support of said application, it is, on this 13th day of March, 1914, ordered that the defendant, the E. I. du Pont de Nemours Powder Company, do show cause before this Court on the 30th day of March, 1914, why 8889
the verdict rendered by the jury in favor of the defendant, the E. I. du Pont de Nemours Powder Company, should not be set aside and a new trial granted on the ground that the jury while deliberating upon their verdict had before them a large number of letters, files, pleadings and other papers that were not in evidence in said case and which they examined and inspected, contrary to law.

And it is further ordered that both parties may take depositions under this rule, the plaintiff to take and complete its depositions on or before

6890 *Rule to Show Cause*

March 20, 1914, the defendant to take and complete its depositions on or before March 26, 1914, the plaintiff to take and complete rebuttal affidavits on or before March 28, 1914. All depositions to be taken before a notary public of the State of New Jersey on two days' notice to the attorney for the opposite side.

A copy of this rule to be served within two days.

JOHN RELLSTAB,
Judge.

6891

6892

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEW JERSEY. 8893

BUCKEYE POWDER COMPANY,
Plaintiff,

against

E. I. DU PONT DE NEMOURS POWDER COMPANY, *et als.*,
Defendants.

At Law.
Stipulation.

It is hereby stipulated that the taking of depositions, under the rule to show cause why a new trial should not be granted, in the above-stated matter, shall be on the following dates, instead of the dates named in said rule, to wit: That the plaintiff shall take its depositions on Monday, the 6th day of April, 1914, and the following day if needed; that the defendant shall take its depositions on Wednesday, the 8th day of April, 1914, and the following day, if needed; that the plaintiff shall take its depositions in rebuttal on Friday, the 10th day of April, 1914; and that the argument on said rule shall be made on Monday, the 13th day of April, 1914. 8894

It is further stipulated that if either party shall be unable to complete the taking of its depositions on the dates named, that consent shall be given to an order of the Court making a reasonable extension of time for taking depositions and for said argument of time for taking depositions and for said argument if the parties cannot themselves agree upon the time for such extension. 8895

TWYMAN O. ABBOTT,
LINTON SATTERTHWAITE,
Attorneys of Plaintiff.
F. S. KATZENBACH, JR.,
ROBERT H. McCARTER,
Attorneys of Defendants.

8896 IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NEW JERSEY.

BUCKEYE POWDER COMPANY, Plaintiff, against E. I. DU PONT DE NEMOURS POWDER COMPANY, *et als.*, Defendants.	At Law. On rule to show cause.

8897 Depositions taken in the above-entitled cause, pursuant to a rule to show cause, dated the 13th day of March, 1914, before Elwood W. Moore, a notary public of the State of New Jersey, at the Post Office Building, in the City of Trenton, on the 6th day of April, A. D. 1914, at 11 A. M.

Present:

LINTON SATTERTHWAITE, Esq., and TWYMAN O. ABBOTT, Esq., for the Plaintiff.

ROBERT H. MCCARTER, Esq., FRANK S. KATZENBACH, Esq., WILLIAM H. BUTTON, Esq., and E. H. LAFFEY, Esq., for the Defendant.

8898

CHARLES S. CHEVRIER, a witness produced on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Satterthwaite:

Q. Mr. Chevrier, the position which you hold is what? A. Deputy Clerk of this Court.

Q. Were you such at the time of the trial in this cause of the Buckeye Powder Company vs. E. I. du Pont de Nemours Powder Company et als.? A. I was.

Q. Were you in attendance as such on the day the case was given to the jury? A. I was.

Q. What was that date? A. February 24th, I think was the date.

Q. Did you hand any papers to the jury to take to the jury room or send them to the jury room? A. I sent them through a bailiff, I handed none directly to the jurors.

Q. Will you describe what you had to do with sending out the papers to the jury room as nearly as you can remember? A. Directly after the Judge had taken the exceptions to the charge by counsel, 8900
I went up to the Judge's bench and asked him if he wouldn't call the attention of counsel to the exhibits in the case and ask them to sort out and arrange anything that was to go to the jury room as there was so many of them I was absolutely unable to tell anything about them and Judge Rellstab then called attention of counsel for both parties and said to them that neither the clerk if the Court could tell what exhibits were to go and that counsel must sort them out and be responsible for what exhibits went to the jury room. There was some talk between the attorneys and the court about it and as I recollect one thing Mr. Abbott said was 8901
there might be some exhibits that counsel couldn't agree upon and Judge Rellstab said if they found themselves in that position he would be in his office and would hear them on any such matter. Judge Rellstab then left the bench. I went over to my desk where all the exhibits and papers in the cause were, I don't mean by that the files, all the papers that had been offered in evidence and used in the case, and myself called the attention of counsel to what the court had just said and said to them that they must be responsible for such exhibits as went to the jury room, as I was not familiar enough with them to sort them out.

8902 Q. You say you stated that to counsel? A. Yes, I was just going on to say that Mr. Abbott was standing right in front of me, Br. Button and Judge Laffey were just a little to the right in front of me and Mr. Kattzenbach was at my desk. I am not sure whether he was standing or sitting at that time. I said to counsel that all the papers were there on the desk and then there was some suggestion made by one of the counsel that there were letters or papers of some kind there that had not been admitted in evidence.

8903 Q. Which counsel was that do you know? A. I can't be positive in my mind who said that, or who that suggestion came from.

Q. That is the papers on which desk did the suggestion refer to? A. The desk I had used all through the trial as clerk. Mr. Button turned to Judge Laffey and made some remark that I didn't hear and then turned around and said, "Oh, well, let them all go in."

Q. Whom did he say that to? A. Well, to us all, I didn't—the remark was made generally to Mr. Abbott, to me and Judge Laffey and Mr. Button, we all stood there together.

8904 Q. You all stood there together. With reference to the table occupied by the different counsel, where was that? A. That was at the corner of my table and would be about where Mr. Graham sat during the trial.

Q. During the trial? A. Yes, sir.

Q. Where was Mr. Abbott at that time? A. Mr. Abbott at that time stood practically in front of me, possibly a little to the left.

Q. Then what did you do? A. I then directed my brother who was there with me to go down to the office and get some large red envelopes we have there and put these papers in, and he did so and

8905

came back and put all the papers that were on the top of that desk in those large red envelopes and they were then handed to the bailiff, whether he handed them to me or directly to the bailiff, I can't say. I don't think he handed them to me although I am not sure about it.

Q. With reference to the remark made by Mr. Button to let them all go out, did Mr. Abbott make any response to that? A. Not that I can recollect.

Q. When next did you see any of these papers? A. The next morning, about half past ten o'clock I guess, I am not sure of that hour.

8906

Q. Under what circumstances did you see them the next morning? A. I came in the office that morning about 10 o'clock, I think, and the Judge's stenographer came in and told me that Judge Rellstab wanted me in his room; that Mr. Abbott was there and had said that papers had gone to the jury that should not have gone and he wanted me up-stairs. I immediately went up-stairs and Judge Rellstab was there in his room alone and Mr. Abbott met me, as I recollect, in the outer room, the Judge's outer room and Mr. Katzenbach came in at just about that time and we all went into the Judge's office together and the Judge asked Mr. Abbott what the trouble was, and Mr. Abbott stated that he had learned that papers, letters and so forth had gone in to the jury that were not marked in evidence. There was some talk between the court and Mr. Abbott and the Court directed Mr. Van Horne, or rather I was to tell Mr. Van Horne, or rather he came in just then, I don't remember, either he told Mr. Van Horne directly or I told him, to go to the jury room and get all the paper exhibits that had gone out to the jury. Mr. Van Horne did that and come back with the large red envelopes that went to the jury room.

8907

8908 *Charles S. Chevrier—Direct*

Q. What was done with them then? A. They were handed to me and we all, Mr. Abbott, Mr. Katzenbach and I went out into the large room, into the other room and I took the envelopes and handed them to Mr. Abbott, I opened them, untied the string and handed the envelopes to Mr. Abbott and Abbott took out the papers and said there were letters and other papers in there that had not been marked in evidence. I handed all the envelopes to Mr. Abbott and he took from them a lot of papers which I have here and handed them to me, and I
8909 asked Mr. Abbott if he had sorted them out and he said it was not his business to do so, but he had done so to the best of his ability, simply to oblige counsel or something. I don't exactly know what that statement was.

Q. Was that in the presence of Mr. Katzenbach? A. Mr. Katzenbach was there when I handed the envelopes to him and my recollection is that Mr. Katzenbach, Mr. Button and Mr. Laffey, they had come in after that, had left the room and gone to the court room. That I took these papers from Mr. Abbott and Mr. Abbott and I followed them to the court room.

8910 Q. And then what was done? A. We all went out into the court room and there was some discussion, I don't remember just exactly what about, there was a suit case of exhibits that had not gone to the jury at all, and I called counsel's attention to them and said they had not gone and Mr. Abbott looked over them and found there was one, two or three articles of incorporation as I remember, and he said they should be with the papers that went to the jury. I took them and put them in the envelopes and I asked counsel then if they were satisfied if the papers now in the red envelopes were such as should go to the jury, and Mr. Button an-

swered that "they were satisfied" and Mr. Abbott said that he would take no responsibility in the matter.

Q. What was done with the papers that were separated? A. I took the papers that were separated with me, and have had them in my possession all the time, I took them down to the office and put a tape and seal on them and they are still under that seal.

Q. That is the package you have in your possession? A. That is the package I have in my possession here now. 8912

Q. Have they any marks on them so they can be identified? A. I don't know, I haven't looked at them at all.

Q. For the purpose of the record, about how many of them are there there? A. I should judge about 300 sheets there.

Q. Purporting to be letters? A. Yes, they look like letters, they may not all be.

Q. Is there anything by which they can be identified? A. I don't know that they can be identified if separated, they are under a seal and as they are now I can identify them.

Q. Are they individually marked for identification? A. This is marked "Plaintiff's exhibit 1322," that is the only mark I see on them. 8913

Package of papers referred to by the witness is offered in evidence and marked "Plaintiff's exhibit P. 1, April 6, 1914. E. W. M."

Q. Do you know anything about any other papers that got in before the Jury? A. Only hearsay.

Q. Mr. Chevrier, do you know whether all the file envelopes in which papers had been placed were

8914 brought out or only part of them? A. That is only what the bailiff told me, he brought them out, I didn't go in the Jury room.

Cross examination by Mr. McCarter:

Q. Mr. Chevrier, the several counsel, Mr. Katzenbach, Mr. Laffey, Mr. Button and you were all standing around near the table and quite close together were they not? A. Yes, quite close together.

Q. If I understand you after the Court had said
8915 that counsel had to take all the responsibility with regard to the exhibits that had to go out to the jury room and if they couldn't agree, he would take the responsibility and settle the matter, the question arose with regard to some exhibits that had been technically not offered in evidence, is that what you said, but had been marked for identification, or something of that kind? A. No, I don't understand it just that way, Mr. McCarter.

Q. I have it in my notes that there was some suggestion that there were some papers or letters that had not been offered? A. There might be some question as to papers, that is if counsel couldn't
8916 agree whether they had been admitted or not that there might be some dispute between them as to those papers and he would see them and he would decide whether they had been admitted.

Q. Who made the suggestion that some papers or letters had not been put in evidence that laid on this table? A. That is one question I can't seem to get clear in my own mind. I don't remember.

Q. There was some discussion as to how long a time it would take to sort them out? A. That was an interminable task.

Q. It would probably take several hours. A. I don't remember the time, they said it would take a long time.

Q. Mr. Abbott was there and Mr. Laffey and Mr. Button and Mr. Katzenbach and yourself during all that discussion, weren't they? A. Yes.

Q. And finally you remember its being said it is not worth while to take that trouble, let them all go out? A. Yes, that is the suggestion I understood to come from Mr. Button.

Q. And you took up the red envelopes and package and put them in those red envelopes which your brother had secured? A. Yes, sir; I put all these papers in these red envelopes.

Q. Right then and there? A. Yes, right then 8918
and there.

Q. Before everybody? A. Yes, before everybody.

Q. And your understanding was that they were all to go out and there was to be no selection made? A. That was my understanding, certainly.

Q. Your understanding was all hands agreed to that? A. Yes, that was my understanding.

Q. Now, did you clear the top of the table of all the exhibits which lay there and put them in those red envelopes? A. Yes, I say I did.

Q. You, or your brother Robert? A. Yes, everything was put in the envelopes that was on the top of the table.

8919

Q. A little later do you remember a discussion with regard to the green books? A. Yes, that followed just where I said.

Q. Tell us what you remember about that. A. Mr. Abbott then said as to the exhibits in the green book that he didn't want to mutilate the book and thought if the leaves were pasted down it would answer the purpose just as well, and I turned away at that time when counsel was discussing the pasting down of the leaves of that green book. I don't know what became of that discussion except by hearsay, afterward I heard they were pasted down and were sent in.

8920 Q. Was your brother Robert engaged in collecting the exhibits that laid on the top of the desk and putting them in the large red envelopes while this discussion concerning the green book was in progress? A. My recollection is that that had been finished.

Q. Finished before that? A. By that time anyhow.

Q. Yes, and then the envelopes were either handed to Van Horne or he took them, as far as you know, took them into the jury room? A. Yes.

8921 Q. The jury had retired long before? A. The jury had gone out and the bailiff came back.

Q. Now I will next direct your attention to what transpired after the conversation you had detailed in the presence of the Judge and ask you to state where it was that Mr. Abbott selected from the exhibits in the red envelopes the package which has been marked for identification and under a seal, exhibit P. 1, where was that? A. That was in the Judge's outer room, I mean where his stenographer sits.

Q. You waited there while Mr. Van Horne went and got the red envelopes? A. Yes.

8922 Q. And did Mr. Van Horne deliver them to you or what was his disposition of them? A. He delivered them to me.

Q. And you laid them on the table? A. He delivered them to me in the Judge's private office and we went out together, the Judge said he didn't want to take it up then and we went out into the other room and I opened the envelopes, untied the tape that was around them and opened the envelopes, and either laid them down on the table or handed them directly to Mr. Abbott, I am not absolutely positive of that. Mr. Abbott and I were there together and Mr. Abbott took them and sorted out those papers.

Q. How long a time did that sorting out process consume? A. Three minutes, I suppose; a short time, a very short time.

Q. Were the other gentlemen present during the sorting out? A. No, I don't think so; my recollection is that Mr. Katzenbach and Mr. Button had left and walked out the door and had gone to the Court room.

Q. You think it wasn't longer than three minutes that it took to select from that mass of exhibits those 300 letters?. A. It was a short time, Mr. McCarter, it may have been five minutes, I am not 8924
positive; it was a short time.

Q. And after the package, Exhibit 1, had been opened by you and the conversation that you have related occurred, what became of the remainder of the exhibits, those not put in the package, were they restored to the envelopes? A. My recollection is that I restored them to the envelopes and went out in the court room for Mr. Katzenbach, Mr. Button and Mr. Laffey were having a conversation and I handed them to Van Horne and told him to take them back to the jury room.

Q. Yes, I see; so that after Mr. Abbott had inspected the exhibits and made the selection of those 8925
contained under your seal, the Judge was not interviewed by any one, either you, Mr. Abbott, Mr. Button, Mr. Katzenbach or Mr. Laffey before the exhibits were returned to the jury? A. No, they didn't go back to the Judge's room.

Q. Now, with regard to the desk upon the top of which these exhibits were at the time the Jury retired, that was the desk furthest west, about opposite the one I sat at, wasn't it? A. Yes, right where you sat. You know one corner which Mr. Graham had, at the other corner of that desk.

Q. Now, these gentlemen you name so often, were

8926 all standing right around that desk, weren't they? A. That desk is on a slightly raised platform. I was at what would be the southeast corner of that desk, right where Mr. Graham sat and Mr. Abbott and Mr. Button and Judge Laffey were not on the platform, they were on the main floor right in front of me, about so, at my feet, this way, and Mr. Katzenbach was over on the side where I sat, either standing or sitting down, doing something with the papers, doing something with some papers down there out of my range of vision, I couldn't see him.

8927 Q. Do you remember remarking after Mr. Button's remark concerning which you have testified, something like this, "Well then I will put them all in the red envelopes"? A. Yes, something like that, not directly like that. I said "Well then I will have them all put in these large envelopes and sent to the jury room."

Q. The gentlemen were occupying the same position? A. We were all standing there just the same, I don't remember any change in the position to amount to anything.

Re-direct examination by Mr. Satterthwaite:

8928 Q. Mr. Chevrier, your recollection of the position of counsel, is that recollection of the position during the entire time? A. Yes, it is Mr. Satterthwaite; this whole concern took only a short time, I don't remember of any change in it.

Q. Do you remember whether Mr. Abbott had some exhibits at his table? A. No, not at that time, before that happened I went to counsel for both sides and asked them if they had any exhibits among their papers that had not been turned over to the Clerk, and my recollection is that they both said to me, no; they had turned everything over. If you

remember when the case was closed the Court made an order that all exhibits must be turned into the custody of the Clerk and while some were used by counsel after that, my recollection is that everything was put back in my possession.

Q. Mr. Chevrier, do you recollect that after the separation of these papers that Mr. Abbott, Mr. Katzenbach, Mr. Button were before the Judge and that the Judge asked them if the papers had been separated, do you remember something like that? A. No, I have no recollection of it.

Q. Do you recall Mr. Abbott replying that he had 8930
separated them to the best of his ability and would take no responsibility for it, do you recall anything of that kind? A. Yes, to my recollection, that was in the outer room, I said to Mr. Abbott had he sorted the papers and he said I have done so to the best of my ability, and then it was after our conversation had in the court room he turned around and left us just as I sent the papers back to the jury he said he would take no responsibility for the matter, he did make those remarks.

Q. Did he make those remarks in the presence of the Judge? A. The Judge was in the next room and the others walked away out in the court room. 8931

Mr. McCarter: The Judge all the time was in his private chamber?

Witness: Yes.

Q. Do you recollect that counsel, Mr. Abbott, Mr. Button and Mr. Katzenbach, going into the Judge's chambers after the papers had been separated? A. I have a recollection that we started in there and the Judge said that he had no time and didn't want to be bothered with the matter again, or something of that kind, nothing was said, we merely started in

8932 the room, turned right around and came out; he didn't want to take the matter up again, he was busy or something, and I think the remark was that he had other matters to attend to and we went out.

Q. Mr. Chevrier, you said that you understood that counsel had agreed that those papers—that all hands had agreed that these papers should go out, just what was said that led to that understanding? A. The remark of Mr. Button, "let them all go," on his side, and no opposition from Mr. Abbott and he
8933 stood right there, and I said I will put them all in and send them out; I thought it was agreed by counsel that they should go as there was no opposition to it after the caution I had given counsel, that the Clerk could make no assortment.

Q. Had Mr. Abbott just before said, or called to Mr. Button or yourself that there were papers on that table that ought not to go out? A. Some one called attention that there were papers there not offered in evidence, that is what started the discussion.

Q. That wasn't from Mr. Katzenbach, Mr. Button or Mr. Laffey was it? A. No, I imagine that
8934 was from Mr. Abbott, although I can't remember that distinctly because then Mr. Button turned to Judge Laffey and had a conversation with him and they said, "let all go out."

Q. Are you sure Mr. Abbott stood by you in the same place when Mr. Button made that remark as he had a moment previous? A. I am very sure.

Q. What circumstances led you to think he had not moved from there? A. Just the very vivid impression I still have in my mind of having Mr. Abbott stand right there in front of me while the whole conversation was going on.

Q. He was down there before and was there dur-

ing most of the conversation? A. In my own mind I am sure he was there during all of that conversation.

Q. Have you any circumstances other than the impression that he was down there all the time, that he was there? A. No, I have a mental picture before me of Mr. Abbott standing there.

ROBERT S. CHEVRIER, a witness produced on behalf of the plaintiff, being duly sworn, testified as 8936
follows:

Direct examination by Mr. Satterthwaite:

Q. Mr. Chevrier, what official position do you hold? A. Deputy Clerk of the Court.

Q. Of this court? A. Yes, sir.

Q. And were you acting as such on the 24th day of February when the case of the Buckeye Powder Company vs. The E. I. du Pont de Nemours Powder Company was submitted to the jury? A. I was deputy at that time, yes.

Q. Did you have anything to do with the sending the papers out to the jury? A. Yes, I did. 8937

Q. What? A. I was present in the courtroom after the judge had cautioned counsel, through the judge's charge and then cautioned counsel, and then my brother said to me to go down stairs and get some large red envelopes to put the exhibits in, and I went out and down to the office and came back to the courtroom with a number in my hand, I don't know just how many.

Q. Who were present in the courtroom at that time? A. When I went out or when I came back?

Q. When you came back. A. Well all of the

8938 counsel in the case that had been around. The judge had left the bench and Mr. Abbott was pasting up the green books when I came back, and there was a discussion about pasting of certain exhibits in the green books.

Q. Where was Mr. Abbott at that time? A. He was standing on the main floor at the end of the desk that had the exhibits on, is my recollection.

Q. Had which exhibits on do you mean? A. All the exhibits, the ones spoken of here before, the one the clerk had used.

8939 Q. These green books which contained exhibits, they weren't on the desk? A. No, sir, they were not.

Q. They were on the desk which Mr. Abbott had occupied during the trial?

Mr. Katzenbach: I think that is leading.

Q. (Continuing) What table were they on? A. Well, I don't remember where the green books were, my recollection is there was a set on the other counsel's desk, too.

Q. A set on each desk? A. A set on each desk, that is my recollection, which ones they were, I

8940 couldn't tell, I never looked at them. My brother told me to put them in envelopes and I took the papers to the desk and put them all in envelopes and handed them to the bailiff to take to the jury.

Q. Did you take all the papers that were on the desk? A. My recollection is we cleaned the desk.

Q. You say you handed them to the bailiff? A. That is my recollection, I handed them to the bailiff.

Q. Which bailiff? A. Van Horne.

Q. Now, when was your attention next called to these papers? A. The following morning when in the train before it left Clinton Street station for

8941

New York, Mr. Abbott asked me if the letters had gone to the jury and I told him "yes, everything that was on his desk was gone." I think that is the next I remember of these papers.

Q. Mr. Abbott boarded the train you were going on? A. Yes.

Q. What then did he do, what did he say in reply to that? A. That they shouldn't have gone out—a great many among them were not exhibits, he may not have said it in that form, some such expression as that, I don't remember his exact words.

Q. Did Mr. Abbott make any further remark as to what he proposed to do? A. Not that I remember, he was very emphatic that there were papers there that should not have gone out, but what he was going to do about it I don't think he said anything to me about that. 8942

Q. Did he say anything about calling the judge's attention to that? A. If he did, I don't remember it now.

Q. What did you do? A. He was with Mrs. Abbott, seeing her off, we only had a few minutes there then he left the train and came back, of left the train, I don't know where he went after that.

Q. Did Mr. Abbott after that time ask you about any particular papers going out? A. The next time, it was after that, some days after, I have forgotten the date, when Mr. Abbott came in the office and was talking about the papers and he wanted to know where the exhibits were that had been brought back from the jury room, and I told him I didn't know; I had never seen them after they went out. He sa[illegible] how would he find out or some such remark as that, and I said Mr. VanHorne, the bailiff, put them away in a room upstairs, and I would call him, and he told me to, and I think Van Horne just came in the door then and I asked him to take 8943

8944 Mr. Abbott up and show him those exhibits and Mr. Abbott turned to me and asked if I wanted to go up with them, and I said if you prefer, of course, I will go up and we went up then to the fourth floor, the file room, and looked over the exhibits and sorted out certain ones which I have present here.

Q. You have papers here, then, which you sorted out then from papers which had been returned from the jury room? A. Papers Mr. Van Horne said had been returned from the jury room.

8945 Q. Were they put in your custody subsequent to that? A. Yes, sir.

Q. And have been since? A. And have been since.

Papers produced by the witness are offered in evidence and marked Plaintiff's Exhabit P-2 and P-3 respectively.

Q. This red file envelope which you produce containing papers which are marked as exhibits, and is now marked Exhibit P-4 this envelope and its contents were likewise among the papers sorted out from those which had been identified by Mr. Van

8946 Horne as coming from the jury room? A. Yes, sir

Red file envelope referred to by the witness is offered in evidence and marked Plaintiff's Exhibit No. 4.

Not cross examined.

JOHN S. NEARY, a witness produced on the part of the plaintiff, bein duly sworn, testified as follows: 8947

Direct examination by Mr. Satterthwaite:

Q. Mr. Neary you were one of the jurors in this case? A. I was, yes, sir.

Q. Were certain papers and documents brought to the jury room for the jury to examine? A. They were, yest, sir.

Q. How were they brought? A. In red envelopes.

Q. By whom? A. The bailiff.

Q. Mr. Van Horne? A. Mr. Van Horne.

Q. Have you any idea how many therewere? A. No, there were four or five of them. 8948

Q. In the course of the deliberations of the jury were those envelopes opened and the papers taken out? A. Yes.

Q. Were they all opened? A. They were.

Q. Were the papers examined by the jury in the course of the deliberations? A. Yes, some of them, some the papers by some of the jurors.

Q. How generally were they examined by some of the jurors? A. I don't know that I can tell you that, any more than to say that they looked through the papers.

Q. Were they looked through generally or not? A. I don't think they were all looked at. 8949

Q. Were the papers generally— —

Mr. McCarter: Don't lead him, let him say what was done.

Q. Can you say whether or not the contents of the envelopes were examined and inspected by nearly every member of the jury?

Mr. McCarter: That is objected to as leading.

8950 A. I think so.

Q. What do you mean by that answer?

Mr. McCarter: That is objected to.

A. I can say this to explain that I don't think that all the papers were examined by all the jurors.

Q. What do you think about it? A. In fact some of the jurors didn't look at them at all.

Q. Do you know who looked at them? A. I think all but one.

8951 Q. Did the bailiff before the jury had agreed upon its verdict come to the jury room and get the file envelopes? A. My recollection is he took out one envelope.

Q. Do you recollect whether the papers had been out and examined by some of the jurors? A. I can only repeat what I have said, that all of the envelopes had been opened.

Q. That particular one had been opened? A. I expect it had been.

Q. Was that returned afterwards? A. It was.

Q. I hand you a paper marked exhibit P-2 and ask you if you recollect seeing that? A. That looks like a paper I saw there.

8952 Q. I hand you a paper just marked P-3 and ask you if you have seen that before?

Mr. McCarter: I offer the same objection.

A. I don't remember this one.

Q. You say you don't remember that? A. I don't remember that one.

Cross examination by Mr. McCarter:

Q. Do you remember what time the first ballot was taken Mr. Neary?

8953

Mr. Satterthwaite: That is objected to as not cross examination and immaterial.

A. I think it was in a half hour after we went out.

Q. At that time had you seen Exhibit P-2?

Mr. Satterthwaite: Objected to as immaterial.

A. I don't think I had seen it at that tme.

Q. Had the envelope been opened and the papers looked at in the manner you have described before the first ballot was taken? 8954

Mr. Satterthwaite: Objected to as immaterial.

A. My recollection was that the envelope had not been opened at that time.

Q. What gentleman of the jury can you remember to have examined any of the documents at any time? A. Most all of the jurors examined the documents more or less with the exception of one.

Q. That is, you, during the time that you were out, observed with the exception of one of the jurors, the other eleven, had some of the papers, is that it? A. Yes. 8955

Q. When was the second ballot taken?

Mr. Satterthwaite: Objected to as immaterial and not cross examination.

A. Mr. McCarter, I don't think I can tell that.

Q. Was it during the evening? A. It was taken probably within the next hour or hour and a half after the first one.

Q. How many ballots were taken before you finally reached a conclusion?

8956 *James E. Van Horne—Direct*

Mr. Satterthwaite: Objected to for the same reason.

A. I think there were eight or nine ballots, I am not positive.

Q. How many ballots had been taken before any of the papers were examined or looked at by anybody?

Mr. Satterthwaite: That is objected to.

A. I can't answer that Mr. McCarter.

8957 Q. Isn't it a fact that none of the papers were looked at until night fall came on and more for the purpose of amusing or interesting the gentleman than anything else, they merely glanced through the papers?

Mr. Satterthwaite: That is objected to on the ground that it is immaterial.

A. They were examined more after lunch than they were before lunch, that would probably mean after nightfall.

Q. Now, so far as you are personally concerned you voted the same way on each ballot?

8958

Mr. Satterthwaite: That is objected to as immaterial and improper.

JAMES E. VANHORNE, a witness produced on the part of the plaintiff, being duly sworn, according to law, testified as follows:

Direct examination by Mr. Satterthwaite:

Q. Mr. Van Horne you are bailiff of this court?
A. I am.

Q. And you were on the 24th of February? A. Yes, sir.

Q. Did you deliver some papers in this case to the jury? A. I did.

Q. From whom did you receive them? A. I took the books and the map from the court room and I took the paper exhibits from Mr. Robert Chevrier.

Q. And you delivered them to whom? A. To the jury.

Q. How were those paper exhibits arranged? A. They were, my recollection is they were envelopes like that (indicating).

8960

Q. Red files? A. Red file envelopes, there might have been some loose ones, I don't remember, I think they were all in envelopes.

Q. You say like this, you are pointing to P 4? A. Like this red envelope (designating P 4).

Q. Did you see anything of them after that? A. Yes, I was directed by the Court the next morning to go and get the exhibits.

Q. What time was that? A. Somewheres around nine or ten o'clock in the morning, I don't know the exact time.

Q. Did you go and get them? A. I did.

Q. How many did you get? A. I don't remember exactly how many I got, the Court directed me to go and get the exhibits and I said "Do you want the books" and he said "no, the papers," and I brought out the envelopes, my recollection is I brought out three or four.

8961

Q. You left some in there? A. I think not; I was told to get the paper exhibits.

Q. You don't remember how many you brought out, what did you do with them? A. I took them in the judge's room and Mr. Abbott and Mr. Laffey and Mr. Katzenbach and Mr. Button, that was all.

Q. You subsequently returned them to the jury room? A. Yes, sir.

8962 Q. You don't know what papers were removed? A. I do not.

Q. After the jury had rendered a verdict did you do anything with the exhibits that were in the jury room? A. After they rendered the verdict?

Q. Yes. A. Yes, I did.

Q. What did you do with them? A. They were taken upstairs.

Q. By whom? By me and Mr. Sailor the books and map.

Q. What did you do with them? A. Put them in
8963 the exhibit room on the fourth floor east of the court room on the other side of the court room.

Q. Under lock and key there? A. Yes, I have a key, the clerk has another key and the janitor has the third.

Q. Did you visit them subsequently in the presence of Mr. Abbott and Mr. Chevrier? A. Yes.

Q. Did you point out to Mr. Abbott and Mr. Chevrier where the papers were? A. I pointed out to Mr. Chevrier where they were, they were segregated, the books under the table in a box and the paper exhibits on the table in another box that was there.

8964 Q. Did you see whether Mr. Chevrier took any of them? A. No; I left them upstairs.

Q. Then you pointed out to Mr. Chevrier and Mr. Abbott the exhibits in this case? A. The exhibits that came from the jury room.

Q. You made a distinction between the maps and the green books and the books of account and the so-called paper exhibits, do you classify them? A. There were three classifications, I call it.

Q. So far as you know, I understand you to say, you took back to Judge Rellstab's office all the so-called paper exhibits? A. Yes, sir.

Q. When the judge sent for you and directed you

8965

to go upstairs where the jury was did you go in the jury room and get the exhibits, or did you ask him whether he wanted the books of account and the green books? A. The Judge said, "Mr. Van Horne, go and bring the exhibits in here," and I said "do you want the books" and he said "no, I want the paper exhibits and envelopes."

Q. And you followed his direction? A. I might say this, that I was also directed by the judge to ask if the envelopes had been examined, the papers in the envelopes and I asked the foreman if they had been examined and I think Mr. Sturgeon answered that they had.

8966

Q. Did you comply with the judge's request and bring out all of the exhibits? A. I did, sir, to the best of my recollection.

Q. Do you know whether among the papers there were so-called contracts? A. I don't know anything about the contents of the envelopes.

Q. At the time that you went into the jury room to get the envelopes, were the paper exhibits all in the envelopes or all loose around the table? A. I think they were all in the envelopes because they were handed to me immediately.

8967

Cross examination by Mr. McCarter:

Q. I understand you to say that you took back all the paper documents, all the paper envelopes? A. Yes, sir.

Q. You don't know what papers were left in them? A. No, sir, I do not know.

8968 PETER O. STURGEON, a witness produced on behalf of the plaintiff, being duly sworn according to law, testified as follows:

Direct examination by Mr. Satterthwaite:

Q. Mr. Sturgeon, you were one of the jurors who tried this case? A. Yes, sir.

Q. Were any exhibits or papers brought to the jury room in red file envelopes? A. Yes, sir.

Q. What was done with those exhibits and the contents? A. You mean when they were first brought in, you mean?

8969 Q. After they were brought in? A. They were all on the table, six or seven of them near the box of books in the corner.

Q. Was this one that you referred to, P. 4? A. There were six or seven, the papers, some had papers in some had leases and different other things.

Q. Were these envelopes opened? A. Yes, sir; I opened some myself.

Q. How many of them were opened? A. Well, during the course of the time we were in the room every one of the envelopes were opened and examined by nearly all of the jurors.

Q. Did you notice how many of the papers you examined were marked? A. I didn't take particu-

8970 lar attention to all the papers, only one paper in particular I paid attention to, the letter regarding the union business which had been sent out, a circular letter of some description, they wouldn't have a man who didn't belong to the union in their employ, and I showed it to Mr. Rockhill and Mr. Woodhouse, that part.

Q. I ask you if you noticed how many of them were marked with some kind of mark? A. I didn't pay any particular attention to that.

Q. Marked as exhibits or for identification? A. I didn't pay particular attention to only this one.

Q. Do you remember the bailiff coming into the jury room and getting some of the papers? A. Yes, I helped to pick them up and helped him put them in the envelopes.

Q. Had the envelopes which he took out been opened and examined? A. Yes, sir.

Q. And the papers in them examined? A. Yes, sir; I put them in the envelopes and I handed out, one or two of them.

Q. I hand you exhibit P 2 offered in this hearing to-day and ask you if you remember seeing that? A. Yes, sir. 8972

Q. Where? A. In the jury room I paid particular attention to it, Mr. Graham's name appeared on it at 42 Broadway and I thought he was a Philadelphia lawyer.

Q. I hand you P 3 in this matter and ask you if you remember seeing that? A. Yes, sir.

Q. Where? A. In the jury room, I remember reading the list regarding Brewster's report, a similar list, I wouldn't say positive this is the list, a similar list regarding Brewster's report. I don't know what the paper was, I don't know anything except it was something about Brewster's report; I don't know whether I saw that particular one or not, I saw so many papers I wouldn't say positively I saw that. 8973

Q. Did you see one similar to that? A. I saw one, it might be four or five or six or seven sheets. I don't know whether it was marked for identification or an exhibit, I don't know whether it was that particular one; I might have seen it, I don't remember positively, I seen every paper in there, glanced over it or something.

Not cross examined.

8974 *August Jenter—Cross*

AUGUST JENTER, a witness produced on the part of the plaintiff, being duly sworn according to law, testified as follows:

Direct examination by Mr. Satterthwaite:

Q. Mr. Jenter, you were one of the jury that tried this case? A. Yes, sir.

Q. You remember the papers being brought to the jury room? A. They came, if you have reference to those envelopes, they came in envelopes just
8975 the same as this (indicating P 4) I think about four or five of them, something like that.

Q. Do you know whether or not these envelopes were opened? A. They were all opened.

Q. By whom? A. Opened by some of the jury, not all of them but by somebody.

Q. After they were opened what was done? A. They looked them over, some of the jurymen looked them over during the time we were in there and we put them back in the envelopes again generally after we looked them over.

Q. Do you remember any of them being taken out? A. Yes.

Q. By whom? A. By Mr. VanHorne.

8976 Q. Do you know whether the contents of these envelopes had been taken out and examined? A. I think so.

Q. I show you P 2 in this matter and ask you whether you remember seeing that at any time? A. No, sir; I don't remember seeing that.

Cross examination by Mr. McCarter:

Q. Had there been a vote as you recall before the envelopes were opened?

Mr. Satterthwaite: Objected to as immaterial and not cross examination.

A. I think so.

Q. Did you change your vote at all?

Mr. Satterthwaite: Objected to as improper and immaterial.

A. No, sir.

JOHN F. DICKSON, a witness produced on the part of the plaintiff, being duly sworn, testified as follows: 8978

Direct examination by Mr. Satterthwaite:

Q. Mr. Dickson, you were one of the jurors in this case? A. Yes, sir.

Q. You remember the papers being brought in the jury room in red file envelope similar to that marked Exhibit P 4? A. I didn't take notice of them being brought in, I saw a number of these after they were in.

Q. What was done with these envelopes after you noticed them? A. I saw different members of the jury opening them and reading the papers, some of them. 8979

Q. Were the envelopes all open or were they not? A. That I couldn't say.

Q. Did you see some of the papers taken out of the jury room? A. Yes, sir.

Q. About when was that? A. I think it was the second day we were out.

Q. Do you know whether they were taken out in the envelopes? A. I ain't positive whether that was the envelope or a package of papers, I saw the bailiff come in there and get a lot of papers, which excited my wonder, what was up.

8980

Q. Did you see them brought back? A. I did not.

Q. Do you know whether the papers were taken out and examined? A. I don't know whether the papers were taken out of this envelope, the papers were pretty generally used.

Cross examination by Mr. McCarter:

Q. You didn't examine them, did you? A. I did not; no, sir.

8981

W. HOWARD SHREVE, a witness produced on the part of the plaintiff, being duly sworn according to law, testified as follows:

Direct examination by Mr. Satterthwaite:

Q. Mr. Shreve, you were one of the jurors in this case? A. Yes.

Q. Did you see some papers brought in the jury room? A. Yes, sir.

Q. How were they brought in? A. In envelopes similar to that, I think.

Q. What was done with those envelopes after
8982 they were brought in the jury room? A. I think they were opened by some one, I don't know who.

Q. You say they were opened, what do you mean, were they all opened? A. I couldn't say all, which ones were I couldn't say that.

Q. Did you examine any of the papers? A. I did not.

Cross examination by Mr. McCarter:

Q. Had you taken a ballot before the envelopes were examined?

8983

Mr. Satterthwaite: Objected to as not cross examination.

A. I think we took several ballots.
Q. Before they were examined? A. Yes.

JAMES B. BELL, a witness produced on the part of the plaintiff, being duly sworn according to law, testified as follows:

8984

Direct examination by Mr. Satterthwaite:

Q. Mr. Bell, you were one of the jurors that tried this case? A. Yes, sir.

Q. Do you remember certain documents being brought into the jury room, papers and documents? A. Yes, sir.

Q. After the jury had retired? A. Yes, sir.

Q. They were brought in how? A. Why, my recollection is they were brought in by one of the court officers and said there were a lot more papers in this case.

Q. Were they in envelopes? A. In a large package.

8985

Q. I show you Exhibit P 4 in this matter; were they similar to that? A. In packages of that kind.

Q. What was done with these envelopes after they came in? A. They were used by the jury, looked over very thoroughly.

Q. How do you mean used, taken out of these envelopes and some of the loose papers were read? A. I recollect there were letters from Mr. Waddell to the du Pont Powder Company and also to the Hazard Powder Company.

Q. You say they were taken out of these envelopes, what do you mean? A. They were taken out of a large package like this and they were sep-

8986 arate papers that had been packages with rubber bands.

Q. How many envelopes were there? A. I couldn't tell that.

Q. Were they all opened? A. Quite a number, I haven't a recollection of the exact number I should say there were thirty or forty.

Q. Were the papers examined by the jurors after they were taken out? A. I believe they were, I examined some of them.

Q. And do you remember the bailiff coming and
8987 getting some of these papers the next morning after you went out? A. Yes, I can't remember how long after the papers brought in but the court officer came in and said there was a package of papers the court asked for and he took them away and my recollection is he brought back some of the papers but not all of them I am not positive about that, my impression is he brought back some of them after taking those papers out.

Q. I hand you P-2 in this matter and ask you if you have ever seen that before? A. Yes, sir; I recollect this paper very well, several of them were speaking about the attorney's names on here.

8988 Q. Where did you see it? A. In the jury room we saw the name of George B. Graham, Broadway, New York, and the question was brought up whether he was a New York lawyer, we were all under the impression his office was in Phailadelphia, and for that reason I recollect this paper very well.

Cross examination by Mr. McCarter:

Q. Did you look inside of that paper or only at the endorsement? A. Yes, sir.

Q. You looked inside of it? A. Yes, sir. And

the different particulars in this paper were discussed whether they had been proven or not.

Q. That is a bill of particulars? A. That is the paper I had.

LLOYD H. ROCKHILL, a witness produced on the part of the plaintiff, being duly sworn according to law, testified as follows:

Direct examination by Mr. Satterthwaite:

8990 Q. Mr. Rockhill, you were one of the jurors in this cause? A. Yes, sir.

Q. Do you remember after the jury retired to consider the verdict papers and documents being brought into the jury room? A. Yes.

Q. They were brought in in envelopes? A. Yes.

Q. Similar to P 4? A. Yes.

Q. What was done with those envelopes after they were brought in? A. They were opened, I couldn't say that all were opened, a number were opened and the papers handled and some of them read.

Q. How many of the jurors would you say han- 8991 dled them? A. I couldn't say, I think probably five or six.

Q. Would they all handle the same papers? A. Well, I couldn't say, I think some of the papers and some of the envelopes were handled by five or six of the jurors, I couldn't say they all were.

Q. Do you remember the bailiff calling to take some out? A. Yes, sir.

Q. When was that? A. The next morning.

Q. Do you know whether the papers in the envelope which he took out had been examined? A. Yes, quite some of them, I couldn't say as to all of them.

8992

Q. Do you remember his returning any? A. Yes.

Q. I hand witness P 3 and I ask him whether he has seen that before? A. No, I think not.

Q. Did you see anything similar to that?

Mr. McCarter: That is objected to.

Question withdrawn.

Q. Just examine that more thoroughly and see whether you can say whether you saw anything similar to that?

8993

Mr. McCarter: That is objected to, the witness has carefully examined it and says he didn't see it; it is immaterial.

A. I never saw this document, I saw a document similar to that which had sheets of this size and quality of paper, that is one similar to the one I recollect seeing.

Q. Describe the one you recollect seeing. A. It had a blue or green cover.

Q. What was the nature of its contents? A. I don't recall.

Q. P 2 is handed to the witness and he is asked

8994 "have you ever seen that?" A. I saw a document of this character, this color, it had Mr. Graham's name on it, 42 Broadway, New York City, but I don't think this is the one.

Q. Why? A. Because the one I recollect seeing had a list of names in it commencing on the first page, my recollection is.

Q. It had a list of names commencing on the first page. I call your attention to P 3, which has a list of names commencing on the first page.

Mr. McCarter: Objected to as leading.

8995

A. This is not the one I referred to, this list of names continued down for several pages and then there were names on the first page, two paragraphs of reading matter at the top, which, as I recollect, this is not the one I refer to.

Q. Do you know what that paper purported to be which you refer to? A. Yes, I think it was a list of the customers which had been, as the Buckeye claimed, taken away from them.

Q. Did you notice, Mr. Rockhill, how many envelopes Mr. Van Horne took out at the time? A. I think only one, I think at this time only one.

8996

Cross examination by Mr. McCarter:

Q. How soon did you take a ballot, Mr. Rockhill.

Mr. Satterthwaite: Objected to as not cross examination and immaterial.

A. I think within five or ten minutes after we went out.

Q. Did you change your vote at all?

Objected to as improper and immaterial.

8997

A. No.

At this point a recess was taken until 2.15 P. M., for lunch.

8998 *Edgar T. Beers—Direct*

After Recess—2.15 P. M.

EDGAR T. BEERS, a witness produced on the part of the plaitiff, being duly sworn according to law, testified as follows:

Direct examination by Mr. Satterthwaite:

Q. Mr. Beers, were you one of the jurors in this case? A. I was.

Q. Do you remember papers and documents coming to the jury room after the jury had retired? A. A number of papers being brought into the jury room after the jury had retired.

8999

Q. After you had gone into the jury room to consider your verdict? A. Yes, I remember papers being brought in.

Q. How were they brought in? A. I couldn't say.

Q. Were they in envelopes, do you remember- A. Some of the papers were in envelopes.

Q. Witness is shown P 3 in this cause and asked were they similar to that? A. Yes, they were envelopes similar to that.

9000

Q. Did those envelopes contain the papers you speak of? A. What papers?

Q. Papers that were brought into the jury room that you have spoken of, were they in envelopes? A. There were papers in envelopes similar to that one.

Q. Were there any papers in any of these envelopes, do you remember? A. I couldn't say.

Q. You don't know? A. No, I couldn't say.

Q. What was done with these envelopes after they were brought into the jury room? A. They were resorted to at various times for examination.

Q. By whom? A. By different jurors.

Q. How many of the envelopes were opened and the papers removed? A. I couldn't say.

Q. About how many jurors looked at them? A. There may have been a half dozen.

Q. Do you remember any of these papers being called for by the bailiff, Mr. VanHorne? A. Yes.

Q. When was that? A. I can't recollect the time, I know they were called for.

Q. Was it some time after you went out? A. I think they were.

Q. Wasn't it the following day? A. You said the day we went out, I misinterpreted that it was 9002
the day the jury went out.

Q. You were out two days. A. Yes, we were out two days, it was when the jury retired.

Q. When, the second day? A. The last day the jury was out.

Q. Did you see what he took out from the jury room? A. No.

Not cross examined.

GEORGE W. PRALL, a witness produced on behalf of the plaintiff, being duly sworn according to law, 9003
testified as follows:

Direct examination by Mr. Satterthwaite:

Q. Mr. Prall, you were one of the jurors who tried this case? A. Yes, sir.

Q. Do you remember papers being brought into the jury room? A. Yes, I do.

Q. After you had gone out? A. After we had retired.

Q. What were they in, were they in envelopes? A. I recollect them in envelopes.

9004

Q. Similar to P 4? A. Similar to that in size, I had the impression, I think, they were manilla, large envelopes.

Q. Look at P 4, were they similar to that? A. Similar to that except as I say, I had an impression they were manilla and different color.

Q. After they were brought into the jury room what was done with them? A. They were deposited on the table and the contents were inspected by some of the jurors.

Q. How many of the jurors inspected the con-
9005 tents? A. I saw three or four at least, possibly more.

Q. Do you know how many of the envelopes were opened? A. I do not.

Q. Do you know whether they were all opened? A. I have the impression that most of them were opened, if not all.

Q. Do you remember papers being called for or part of them being called for? A. Sent for?

Q. Yes. A. I am unable to say whether I recollect that distinctly or whether from what I heard. I am unable to say, I think they were sent for.

Q. Do you know any of the officers of the du
9006 Pont company, Mr. Prall? A. I do, Mr. Patterson

Q. When did you meet him?

Mr. McCarter: That is objected to as irrelevant and immaterial and not covered by any of the reasons or theory upon which this rule was granted, the rule being granted upon the ground of the alleged or supposed examination, and at the time when Mr. Prall knew Mr. Patterson or anybody else is entirely irrelevant and immaterial.

A. I think about three years ago.

Q. Have you met him recently?

Mr. McCarter: The same objection.

A. I have not.

Q. Have you met him during the progress of this trial?

Mr. McCarter: The same objection.

A. I shook hands and spoke to him during the progress of the trial.

Q. What did you say to him at that time?

Mr. McCarter: Same objection.

A. Just simply a casual meeting, do you wish to know whether I said anything in regard to the trial? 9008

Q. Yes. A. Absolutely nothing.

Q. Did he say anything as to why the suit was being defended or anything of that sort?

Mr. McCarter: Same objection.

A. Nothing at all.

Q. Did you meet any other officer of the company during the progress of this trial?

Mr. McCarter: Same objection.

A. I did not.

Q. Do you recall Harvey Satterthwaite seeing you to get an affidavit? A. Yes, sir. 9009

Q. Do you recall the conversation with him? A. Yes, sir.

Q. Did you have a conversation with him in which Mr. Patterson's name was mentioned?

Mr. McCarter: Same objection.

A. No, sir.

Q. Did you mention any name of any officer of the company in that conversation?

Mr. McCarter: Same objection.

A. I did not.

Not cross examined.

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TWYMAN O. ABBOTT, a witness produced on the part of the plaintiff, being duly sworn according to law, testified as follows:

Direct examination by Mr. Abbott:

Q. Mr. Abbott you were one of the counsel for the defendant in the trial of this case? A. Yes, sir.

Q. You were present at the time the jury retired? A. Yes. sir.

Q. After the Judge's charge? A. Yes, sir.

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Q. You have heard Mr. Chevrier's testimony as to what occurred at that time? A. Yes.

Q. Will you state what took place in regard to the sending out of exhibits? A. Yes, as I recall the circumstances they were about like this. Just as the court had sent the jury out, either before or after, I don't recall exactly, I arose and told him I wanted to have some of the exhibits at least go to the jury room and mentioned particularly the books and called attention to the fact that the green books which contained the records of the Government case, some exhibits some parts of them had been admitted and other parts had not and

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the question then came up as to how those papers should go to the jury room. The Judge in fact stated that we should try to stipulate with counsel as to that matter and I told him there might be some difficulty about that, and he said he bought we would be able to agree and if not to bring the matter before him, that was as I recall before he left the bench. I then stepped over to the clerk's desk where these papers were and Mr. Katzenbach, Mr. Laffey and Mr. Button were there, I don't recall whether Mr. McCarter was there or not and I brought up the question as to what should be done with those exhibits and I suggested that we

paste down the leaves of those that had not been admitted, and after a little discussion that was agreed to. Well, just about this time I noticed Mr. Button with a pile of letters which he had read into the record, at least over near that part of the desk where those papers were and I asked him if he was going to send those out and he said, "yes, he was thinking of it," or something to that effect, and I said "there are some papers among those that have not been admitted you want to look out about this." I don't recall exactly what he said but he did turn around and make some remark to 9014
Mr. Laffey, I believe he was standing next to him, and I think before he did that he said he didn't care to take the trouble to separate them. Then I made some remark to the effect that they were his exhibits and of course I didn't care whether they went to the jury room or not. Something to that effect. Well, now, just what transpired after that I don't recall further than this, that I took the books then and went to the adjoining room where we were keeping our papers for he purpose of pasting the leaves down and I was in there some time, I think I went to lunch, I wanted to get something to eat before that, but I am sure at any 9015
rate when I came into the jury room again.

Q. The court room, you mean? A. The court room. I saw the desk had been pretty well cleaned off and they were just carrying out the defendant's map exhibits and I spoke to Mr. Robert Chevrier who was doing that and said if you are going to take exhibits, take ours too, and he said "Oh, yes, he was doing that." Well, I went out, it might be some other remarks did pass, but just what they were, I am unable to say. I did not hear anything more about any of the exhibits, and I attempted to give to the clerk the book exhibits after they had

9016 been pasted in and when I gave them to Mr. Van Horne I understood him to say that he had taken them into the Judge's room to show them to him and to see if they were properly pasted and after that deliver them to the jury room. The next morning——

Q. Before you come to that, did you hear Mr. Button say at that time "let them all go out"? A. No, I can't recall that statement by Mr. Button, after the statement which I made to him about there being other papers there but I can recall that he
9017 said he didn't want to take the trouble to separate them and I saw him talking to Mr. Laffey, what happened after that if anything I am unable to say.

Q. Did you hear any such remark made as Mr. Chevrier has testified to? A. No, I didn't hear that remark.

Q. Were you standing by Mr. Chevrier's table all the time the papers were being gotten ready to go out? A. No, Mr. Chevrier is mistaken about that, at least that is my recollection of it because when I left the court room nothing had left the table. I took the books and went out of the room and
9018 at that time nothing had left the table. I went back and when I came back into the court room at 4 o'clock I heard the maps were being taken out and I noticed the table was cleared and I didn't know whether the papers got to the jury room or where until the next morning.

Q. Did you agree in any way to the sending out of the papers that were not exhibits, those that were not exhibits?

Mr. McCarter: That is objected to.

A. I certainly did not agree. If anything was said as Mr. Chevrier testified that there was, I cer-

tainly didn't make any reply to that, I have no recollection at this time of ever having heard that statement made.

Q. Did you hear any such statement and remain silent? A. No, I say if I had heard the statement I think I would have recollection of it. I certainly did not intend to accede to it and my recollection is that I said a second time "I don't want any papers sent out that were not admitted." I know I said it once, whether I said it twice or not I don't know.

Q. What about the next morning? A. The next morning I went down to the train to see my wife off 9020
to New York and Mr. Robert Chevrier came in, I think that is the one, Robert, yes; he said he sat in the seat just in front and just as the train was ready to start I said by the way, "What did they do about the exhibits" and he said he took out everything that was on the table. I said "I am afraid if you did that papers have gone to the jury room that have not been admitted and I shall call the Court's attention to it." So I came up to the Judge's chambers right away and went in there, the Judge was not there and I spoke to his clerk, Mr. Vaughn and I told him what I heard Mr. Chevrier say and I thought it ought to be looked into, and I 9021
think he said he would call the Judge's attention to it and about half an hour after that he came and called me and said the Judge was in his chambers and would like to see me. I went in and when I got in, he said he had sent for Mr. Katzenbach and he would be up there in a few minutes and when he came we went into the Judge's chamber and talked to him about it. I told him then what I heard from Mr. Chevrier and after some discussion the Court directed that the papers should be sent for and Mr. Van Horne was sent for and shortly returned with the papers.

9022 Q. Then what was done? A. Well, Mr. Chevrier, Mr. Charles Chevrier, I believe is the gentleman, laid them out on the typewriter desk of Mr. Vaughn and opened them and I think there was two packages, two envelopes and I looked at them and saw some marks for identification and when I called his attention to that, I believe Mr. Button, Mr. Laffey and Mr. Katzenbach, who were present at that time and myself had some controversy regarding it and after that was ended, I undertook to segregate the papers, telling them I didn't feel it my duty
9023 to do it, excepting as I separated them as a matter of convenience and I pointed out those I thought were not admitted and it took may be a few minutes, I don't think it was more than five minutes possibly.

Q. Who was present when you were doing that? A. Mr. Chevrier was there part of the time, I think he went out for a few moments, maybe he was there all of the time, a short time, I simply looked at them and saw they were marked for identification, not marked for exhibits and segregated them, separated them that way and called his attention to it and told him I separated them the best I could and then
9024 we went out in the court room and he asked the other attorneys whether they were satisfied that the papers were properly segregated and then some more discussion took place between counsel and I recall after the discussion that Mr. Chevrier didn't know whether to take them or not, he seemed to be somewhat in doubt about them and he took them as I recall and went into the judge's chambers again, and in a little while I was called. I think Mr. Katzenbach and possibly Mr. Button and I went in then to the judge's chambers again and at that time I stated I had separated the papers as I thought they ought to be separated, and the judge asked me what

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was to be done with them. I believe I said I didn't care to take any responsibility in regard to the matter. The Court said he wouldn't rule on it, he didn't care to be bothered with it and the clerk took the papers. After that, I don't know what transpired to my own personal knowledge.

Q. Was anything said that you would assume responsibility for the correctness of this separation? A. Well, I said I wouldn't assume any responsibility in regard to it, that they had simply been separated to the best of my ability.

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Q. To whom did you say that? A. I said that to Mr. Chevrier, I said it to the judge and I said it to the three gentlemen present, Mr. Katzenbach, Mr. Laffey and Mr. Button.

Q. After the verdict was rendered did you do anything further towards seeing what papers were in the jury room? A. After the verdict was rendered I saw several of the jurors with reference to just what transpired in the jury room in regard to the papers, and in the course of the conversation with one or two of them they spoke of this bill of particulars, using that expression. I didn't know anything at that time about the bill of particulars being in the jury room. I came up shortly afterwards to the clerk's office and Mr. Robert Chevrier was there, I believe, and I asked him if he knew where those papers were that came from the jury room, and he called Mr. Van Horne and Van Horne told him he had taken them in a certain room, and I mentioned that I had learned from these jurors there were some other papers out there would he kindly let me see the papers, so we three went together, Mr. Van Horne, Mr. Robert Chevrier and myself, to the room in this building where the papers were taken by Mr. Van Horne and he pointed them out and he left, Mr. Van Horne left, and Mr. Chevrier and myself examined the papers

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9028 at that time and we found there this paper marked P 2, and also this paper marked P 3, and also the papers enclosed in this document marked P 4, and I called Mr. Chevrier's attention to this particularly as not having been in the case, admitted, and he took them, took them away with him and I haven't seen them until today again.

Q. Did you have any idea or knowledge that those papers were upon the table, the clerk's table, at the time you, Mr. Button, Mr. Laffey and Mr. Katzenbach were around there? A. Yes, I had knowl-
9029 edge that P 4 with its contents was on the table.

Q. These are the book exhibits, P 2 and P 3? A. I didn't know these papers were on the desk, P 3 I had never seen before. I didn't know anything about that until I saw it among the papers there in the room. This P 2 I may have seen this, being a copy of the document similar to the one which I have.

Q. At the time you spoke of having papers out there that were not marked exhibits on the clerk's desk, what papers did you have knowledge of there then? A. The papers that I had in mind at that time were the letters, I know the letters that had
9030 been admitted as exhibits and those that had not been there were much handled and had been intermixed, and I saw Mr. Button with his hands on that pile; I was thinking of those papers and that is what I called his attention to.

Q. Have you any further statement you want to make, Mr. Abbott? A. Not that I think of.

Cross examination by Mr. McCarter:

Q. Mr. Abbott, you had heard the judge during the progress of the trial, and I think before the summing up, direct that all exhibits be collected

and given to Mr. Chevrier and put out there on the desk? A. I can't recall, Mr. McCarter, just what the judge did say, I remember there was some discussion about the matter, and I assume the record will show just what he said about it.

Q. And didn't you in fact collect what had been given to the clerk on your side and deliver them at that time? A. I don't think I did, except it was some paper which had reference to those contracts and other documents I may have had on my desk there. And one exhibit I recall particularly, not handing to anybody, was a book exhibit, that is the 9032
books of account, and the exhibits that were in the Government record that had been admitted and the map, I paid particular attention to the maps, but as to the other papers, I don't recall anything unless some of those documents known as the contract list which I had, were handed to me.

Q. Didn't you, in fact, in the course of the several days' argument in summing up the case to the jury, go to that desk of the clerk and refer yourself to some exhibits which you used in the course of the argument? A. I think very likely I did. I was familiar with the papers on that desk very largely.

Q. And didn't you know at that time that all the 9033
exhibits were by direction of the court on that table, except perhaps one or two which had been removed during the argument of the gentleman who had preceded you? A. That may be, I can't say that, I had seen a great many of the papers on that desk.

Q. After, or about the time Judge Rellstab left the bench you recollect standing near the same table we have been talking about, where the exhibits were, where some of the exhibits were and that closely around that table Mr. Charles Chevreir, Mr. Katzenbach, Mr. Laffey and Mr. Button, do you know that? A. We were all very close to the table at the time.

9034 Q. Could you recall that something was said with regard to the Waddell letters that you had offered in evidence and that had not been actually marked in evidence? A. No, Waddell's letters had not been offered in evidence, they were offered for identification.

Q. Do you remember there was some talk on this occasion concerning letters other than those that were marked in evidence on Mr. Button's cross examination of Mr. Waddell? A. Yes.

9035 Q. Now don't you recollect the fact that it was at least suggested that they should be segregated from those that had been marked, and that in reply to that suggestion it was stated that that would take an hour or two and it didn't seem worth while to do that, do you remember that? A. No, I remember this, though that may mean about the same thing. I heard Mr. Button saying he didn't think the jury would read them if they went in and he said it would take some time to segregate them.

Q. And don't you recall some one making the suggestion that so far as he was concerned, he was going to let them all go in and both sides would be spared the trouble of separating them? A. No, I

9036 don't remember that.

Q. Don't you recall the fact that Mr. Button turned around to Mr. Laffey and said "Mr. Laffey, I guess we will send them all in"? A. If I heard anything Mr. Button said to Mr. Laffey I don't recall it, I do remember his turning around.

Q. Did you have any curiosity to learn what he said? A. No.

Q. You were right there, weren't you? A. Yes.

Q. It was after Mr. Button made some remark at any rate to the effect that he was going to let all go out, that you said that you didn't care whether they went or not or something like that? A. No, what

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I said was with reference to the papers being his exhibits and I did say I didn't care whether his exhibits went or not, that they weren't ours and I was looking for my exhibits, I made that statement, I think, more than once or words to that effect.

Q. You knew at that time that these letters, which I will refer to as not offered in evidence on the cross examination of Mr. Waddell, according to your recollection, you know they were on the table? A. Yes, I knew those letters were on the table that is the reason I called attention to it.

Q. They were quite bulky? A. Yes, there were a lot of them. 9038

Q. Now, whatever had been said about it, whatever the understanding was, after you came back into the court room, after pasting up the green books you found they had gone? A. I found everything on the table had gone, that was, I think, it must have been an hour or a little more or it may not have been as long as that.

Q. The maps had not gone for an hour after the jury went out? A. The maps had not gone when I came back into the court room, that is what made me speak of it, they were just taking out the maps of defendants, I notice they had gone out.

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Q. Was Robert Chevrier there when you went out? A. Robert is the younger one?

Q. Yes. A. You mean when I went out the first time?

Q. Yes. A. Well, I can't say as to that; I don't remember Mr. Chevrier being there, he said he was there, but I don't wish to controvert that but I don't remember his being there at the time I went out.

Q. You saw the envelopes in which the papers were put? A. No, I didn't see them put in the envelopes, I know some of them were in envelopes at the time; all those contracts there, I think those

9040 contracts were arranged alphabetically, there must have been fifteen or twenty envelopes or papers these were in I should say there were twenty to twenty-five different envelopes that went to the jury room that I know of.

Q. Did you hear any discussion with regard to lunch for the jury? A. I don't know, I was pretty hungry myself, I remember that; I can't recall whether I heard any discussion about the lunch.

Q. Don't you remember its being agred—— A. I do now, I remember there was a discussion about
9041 that and Mr. Chevrier said that this was a private matter and the expense of feeding the jury would have to be borne by counsel. I told him we would bear our share.

Q. And as I understand your evidence as soon as it was agreed that you might paste up rather than mutilate the Government records you left and went into your own room for the purpose of preparing the book? A. Quite soon after that I can't recall being in the court room at all after that was agreed on, it might be I was for a little time.

Q. That is the last subject of conversation you can remember while you remained in the room? A.
9042 I wouldn't swear to that positively but my recollection is that I went very quickly after that.

Q. And this conversation you remember preceding the talk about the green book? A. Well, it seems to me it was co-incident with it, I am not so sure. We spoke about these papers part of the time and about the books part of the time, I think it was sort of intermixed.

Q. Had you thought at all during the balance of the afternoon in regard to the question as to whether those other papers had gone out to the jury. What was it, that meeting Mr. Robert Chevrier on the train that called your attention to it? A. It

was this: Seeing him there and not knowing what disposition had been made of those other exhibits, and not having seen Mr. Button or any one since, I just out of curiosity thought I would inquire as to what was done, it wasn't a matter I had thought of seriously at all, but inasmuch as I saw Mr. Chevrier it brought the last time I met him before my mind, and I just inadvertently or casually asked him the question.

Q. You then now recall that you had seen him in connection with the matter the day before? A. I said before, I did. You asked me as I understood 9044
it, Mr. McCarter, whether I saw him in the room when I left the room, that is the way I understood your question, that I could not say.

Q. You said you hadn't seen any other gentlemen, hadn't you talked to Mr. Laffey at breakfast at the Hotel Sterling, that mornnig? A. Yes, I think I I did, I don't think I spoke to him about the papers.

Q. At any rate, who opened the conversation with Mr. Robert Chevrier on the train? A. I think I introduced him to my wife.

Q. You came back to the court house and saw the Judge? A. I saw his clerk then.

Q. How many envelopes did Mr. Van Horne bring 9045
back? A. My recollection is there were two, there might have been three.

Q. You swore in the affidavit forming the basis of this proceeding that there were several. A. I think that will cover the affidavit, I understand several to be two or more.

Q. There were not three or four? A. I think there were at least two, there may have been three. I don't think there were four, but I am not so sure about that, I am only giving my recollection off-hand.

Q. After Mr. Van Horne appeared with the

9016 brown envelope they were given by him to whom? A. I think they were placed in the hands of the clerk, Mr. Chevrier.

Q. That was in the presence of the Judge or outside in the anteroom? A. The picture that is now in my mind is that Mr. Chevrier had those papers and I can see him now with the papers on the typewriter desk of the Judge's clerk, and that is the first I can see now of those papers after they came out of the jury room, whether they were handed to Mr. Chevrier there or in Judge Rellstab's chamber
9017 and carried there, I can't say.

Q. This typewriter desk, in what room is that located? A. In the ante-room of the Judge's chamber.

Q. Leading into the Judge's private room? A. Yes, sir.

Q. So that the first picture you have of these envelopes Mr. Van Horne had brought down after they had left the hands of Mr. Van Horne or Mr. Chevrier is of them on this typewriter desk in the adjoining room to the Judge? A. That is the only place I can see them at this moment.

Q. What conversation took place there after they
9018 had been brought in before Mr. Katzenbach and Mr. Button left? A. That is more or less personal; I don't care to relate it, as it has nothing to do with the case.

Q. There was some altercation about the matter, some feeling about the matter? A. I don't care to bring that in, Mr. McCarter; it was unpleasant to both sides.

Q. I don't care to bring that in; anything that transpired, these gentlemen left you in there with Mr. Chevrier. A. I think that is correct; they disappeared.

Q. And you went through the papers and selected

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the batch now under the Clerk's seal and marked P 1 here? A. I selected what I thought were papers that should not have gone in and handed them to the Clerk and except that I haven't seen them except as they were brought here.

Q. You went through all the envelopes that were there? A. I think I did; yes.

Q. How long did that take? A. Well, my recollection is about five minutes; it was a pretty short time.

Q. And after that was over, you told Chevrier to take the balance back to the jury? A. No; I just handed them to him and I didn't give any instructions at all; that was a matter left to more discussion between counsel in the court-room. I simply showed him; I said, "Now, I have separated these to the best of my ability," I think I used that expression, and the Clerk inquired of us what he should do, and I declined to take any responsibility regarding them.

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Q. Did you see Judge Rellstab again that morning? A. Well, my recollection is just as I testified a moment ago, that after this discussion between counsel, which occurred in the court-room that all the counsel except myself disappeared in the direction of the Judge's chamber, and I think Mr. Chevrier and in a little while I was requested to come in, that is my recollection, and I went in there, and we had some colloquy about the papers. The Judge said he was busy, and I think finally said he was too busy to consider it, and declined to give any order in the matter.

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Q. Do you remember asking him for any order? A. I don't think I did; I told him what had transpired and that I had separated these papers, it is possible I did, I thought that the Judge could make such order as he cared to make in the premises.

9052 Q. Do you remember distinctly saying that? A. No; I do not.

Q. You knew Mr. Van Horne, Mr. Chevrier or somebody took the residue of the papers back to the jury room? A. I heard so afterwards.

Q. In fact, you went to look for the exhibits after the jury came in the same day? A. After the jury came in, not the same day.

Q. The day after? A. No; I think it was, just a moment, I think it must have been a week or ten days.

9053 Q. Whenever it was, at any rate, you found the residue of the paper exhibits, so-called, had been with the jury after your segregation? A. Yes; the only reason I went back to see if any had been in the jury room was because of what I had learned from these jurors that they had seen certain papers; I don't know what ones they had seen.

Q. Which jurors were they? A. Some of these spoke as you notice in these affidavits, nearly all of them speak of the demand for the Bill of Particulars; I knew I had not seen any such paper among those I examined, and I wondered what they had seen, and I had sort of an idea I would inquire

9054 of the Clerk, and that is when I saw Mr. Van Horne and Mr. Chevrier, and we went up to the room where they were and I saw the papers there at that time.

Q. Do you recall that in the court-room, I think it was, or some room in that building, after you had segregated the papers that are under the Clerk's seal when the question arose in the presence of yourself, Mr. Katzenbach, Mr. Laffey and Mr. Button a sto what disposition should be made of the exhibits that Mr. Button spoke for the three gentlemen and said he didn't care whether they all went back or whether none of them went back, and

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you said you would take no responsibility in the matter, or words to that effect? A. I think Mr. Button made some remark very much like that, and I think I made the remark very much as you have indicated; that it wasn't, I think, I always coupled it with the statement that they weren't my exhibits and I was not looking after any but my own exhibits.

Q. Well, you didn't hand your own exhibits to the jury, did you? A. I had handed all I cared anything about to the Clerk.

Q. When? A. At the time when he was preparing to take the papers out to the jury room. 9056

Q. During this conversation we were speaking of? A. The original conversation, yes.

Q. What exhibits had you that you then and there handed to the Clerk that were not all on the table? A. I called his attention to these contract exhibits and the Brewster report and others of that character and the 95-cent prices and whether I handed this matter or not or whether in the package I can't say. I was anxious to have those parts go out and this book.

Q. I am not speaking of the book; there isn't any difference between us about that; I am speaking of the papers of counsel; are you quite sure you handed a single paper exhibit to Mr. Chevrier at that time? A. No; I am not. 9057

Q. Did you really handle or touch a single document on the desk? A. No, sir.

Q. Weren't your hands occupied with this green book or books about which you were interested about having certain portions go to the jury? A. I think that is right, because I might have handled some of those other papers; I am not sure.

Q. You have no recollection? A. These papers I just referred to, this 95-cent price list.

9058 Q. You have no distinct recollection about that? A. I have no recollection about that distinctly.

Redirect by Mr. Satterthwaite:

Q. When you sorted over these papers after they had been brought from the jury room by Mr. Van Horne, the bailiff, did you see among the papers then P 2, P 3 or P 4? A. No; they were not among those papers.

Q. Did you as a matter of fact know, until you
9059 had been informed by Mr. Robert Chevrier the following day that the papers you understood were on the Clerk's desk, and not exhibits had been sent out? A. No; I did not.

Recross by Mr. McCarter:

Q. Then you are quite certain that your examination of the papers at the time you segregated them was sufficiently careful to enable you now to positively say that none of those documents could have been overlooked by you? A. Yes; I know that and the reason I know that was because there were no papers in that package that Mr. Van Horne
9060 brought out except these letters.

Q. Well, you have already sworn in the proceedings that several packages were brought out, and you have said to-day it might have been three or four. A. Whatever was brought out I examined all of them, and nothing but letters in any of them.

Q. Do you remember what directions Judge Rellstab gave Mr. Van Horne when he sent him to the jury room? A. No; I don't know that I heard that direction; it is just possible I did hear it, but all I know is what I heard Mr. Chevrier testify to here to-day, but I am certain that none of the contracts were brought back, because they were in a number

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of envelopes and I looked through all of the papers that were brought out at that time and I saw nothing of any of these papers. Since you ask me that question, I do remember that Mr. Van Horne had been instructed to bring out all the letters. Whether the instructions that were given by Judge Rellstab or somebody else, simply telling me that is what has been done, I don't know.

Q. You were there and heard the directions and waited until Van Horne came down, didn't you? A. I was there and heard the directions, whether I heard the directions or not I can't say; I saw the papers when Mr. Van Horne came in with them and gave them to the clerk, saw the package.

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At this point the further hearing in this matter was adjourned to Tuesday, April 7th, at 10.30 A. M.

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9064 IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NEW JERSEY.

BUCKEYE POWDER COMPANY, Plaintiff, against E. I. DU PONT DE NEMOURS POWDER COMPANY, *et als.*, Defendants.	At Law. On Rule to Show Cause.

9065 Trenton, N. J., April 7, 1914.

The hearing in the above-stated case was continued pursuant to adjournment. Appearances as heretofore noted.

HARVEY T. SATTERTHWAITE, a witness produced on the part of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Satterthwaite:

9066 Q. Do you know George W. Prall? A. I do.
Q. Did you have a conversation with him recently? A. Yes, sir.
Q. State just what that conversation was.

Mr. McCarter: That is objected to as calling for a conversation between a witness and some third person, and if he is to testify as to particular testimony Mr. Prall gave yesterday, it is contrary to law to undertake to do that upon a collateral matter, and thirdly and finally that the whole subject of which Mr. Prall was interrogated and which we

expect this witness is to be asked about is outside of the scope of the rule to show cause in this matter.

A. I had a talk with him at the time I approached him to obtain a deposition from him for use in obtaining the rule to show cause in this case and during the conversation he told me he had met a Mr. Patterson of the du Pont Company and that after meeting Mr. Patterson and talking with him that he had a thought that he understood the du Pont side of the case the their motives in fighting this 9068
case and that he understood the du Ponts regarded this as a strike case or an attempt to hold them up and that they anticipated other costly suits and were fighting this suit to discourage any other suit.

Mr. McCarter: Notice of a motion is now given to strike out the testimony as incompetent, for all the reasons stated.

A. (Continuing) And he went on and he asked who was financing the suit against the du Ponts and if the lawyers were getting paid on a contingent basis.

Mr. McCarter: I give the same notice. 9069

Not Cross Examined.

ROBERT CHEVRIER, recalled for the plaintiff.

Direct examination by Mr. Satterthwaite:

Q. Mr. Chevrier, I think you testified yesterday that you gathered up the papers from the clerk's desk in the court room and put them in envelopes before they were taken to the jury? A. Yes.

9070 Q. Now, how many envelopes did you put those papers in? A. All the papers or the letters?

Q. The letters? A. Two or more, I am not sure how many more there were, two or three.

Q. That is the letters as distinguished from the other documents? A. Yes.

Cross examination by Mr. McCarter:

Q. The envelopes had no endorsement or indication on the exterior that they contained letters as against other papers, did they? A. No, sir.

9071 Q. All just alike? A. All just alike, blank envelopes with nothing on them.

Plaintiff rests.

DEFENDANT'S PROOFS.

JOHN P. LAFFEY, a witness produced on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. McCarter:

Q. Mr. Laffey, you were one of the counsel for
9072 the defendant in this case and were present I think throughout the entire trial? A. Yes, sir.

Q. Do you remember then, of course, the Judge's charge to the jury? A. I do.

Q. Now I think it would be well if you would go on in your own way and recite what occurred after the Judge finished the charge? A. After the Judge finished his charge there was some discussion between the counsel and the court with reference to the Rice list of contracts found in one of the green books, that resulted in the stipulation or agreement between Mr. Katzenbach and Mr. Abbott that he could give a copy of that list to the clerk. Just

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immediately before the Judge left the bench he cautioned counsel with reference to the exhibits, saying, as I remember, that counsel must agree with reference to the exhibits that were to go out. Mr. Abbott remarked that it might be possible to agree, and the court then stated, as I recall that he would be in his chambers, and they could take up with him any matter in which counsel were unable to agree as to the exhibits. Immediately after the court went to his chambers, Mr. Katzenbach, Mr. Button, Mr. Abbott and myself drew near to the desk on which the exhibits were piled, the desk 9074
which the Deputy Clerk Chevrier had sat at a good part of the time during the trial. Just about that time, as I recall, the Judge appeared in the court room in front of the bench, down on the floor where the attorneys were and stated to the counsel in substance that he had promised the jury their lunch; that the Government made no provision for the meals of the jury and that would have to be a matter of agreement between the parties. Thereupon, I think Mr. Abbott stated that they would be responsible for one half of the meals for the jury and Mr. Katzenbach immediately said that they would be responsible for half of the cost of furnishing 9075
meals to the jury, and both Mr. Katzenbach and Mr. Abbott assured Mr. Chevrier that that was satisfactory.

Mr. Katzenbach then took his seat at the desk where the clerk had usually sat, Mr. Button stood at his right, right close to him and I stood at the right of Mr. Button and somewhat in the rear. Mr. Abbott stood almost facing Mr. Button and Mr. Katzenbach, I am not entirely certain as to just the position that Mr. Chevrier, Charles Chevrier occupied, but he was in the group. A discussion ensued, between counsel, all the counsel present at

the table with reference to the exhibits then on the table. Mr. Katzenbach had started to separate the papers. Mr. Button as I recall stated that it would be difficult to determine what had been read in evidence or what had been marked in evidence or what had not without reference to the printed record. That remark on the part of Mr. Button was the occasion of Mr. Abbott then stating—that he said I have no objection to their all going out, thereupon Mr. Button turned to me and stated, "have we any objection to their all going out," or "we have
9077 no objection to their all going out." It was in the nature of an inquiry to me. I stated in a very loud voice that it could be heard by all those present at the table I saw no objection to their all going out, and Mr. Katzenbach at the same time said, "I see no objection to their all going out." Mr. Button thereupon said to Mr. Charles Chevrier, "let them all go out." Mr. Chevrier then looked at the gentlemen present and said, "well I will put all these papers in these envelopes and send them out." And as I recollect he and his brother started to do it and Mr. Abbott had one of the green books in his hand all of the time and then said, "well if those
9078 papers are going out I want these exhibits in this book to go out," mentioning the Waddell-T. C. du Pont correspondence. Mr. Button, to whom the remark was addressed, said, "why don't you cut them out." Mr. Abbott said in substance, "I can't do that, I don't like to mutilate the volume, this is the only volume I have, won't it be satisfactory if I seal up the book," and Mr. Button said, "all right, seal them up." And Mr. Abbott said, "will it be satisfactory if I do it myself." And to that Mr. Button assented, as all the members were in agreement as to the papers to go out we immediately left the court room, I got my overcoat and joined Mr

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Turner, Mr. Katzenbach and Mr. Button and we went to lunch.

Q. What was the next thing that transpired to your knowledge in regard to the question of some exhibits having gone to the jury which should not have done so? A. The next day, the jury being still out, in the neighborhood of 11 o'clock we went in Mr. Katzenbach's office and he received a message which caused him to go over to the court room, and he left and said something about there being some question raised as to the exhibits and he preceded us over, we remained a while in the office Mr. Button and I concluded to go over also, and when we arrived in the court room, or shortly after we arrived in the court room, Mr. Katzenbach came in and said, "Abbott has raised some question with the Judge as to exhibits going to the jury that had not been offered in evidence, and he stated that Mr. Abbott had quoted some arrangemnet or understanding with Mr. Button or something that he had stated to Mr. Button. Thereupon Mr. Katzenbach, Mr. Button and myself went into the anteroom of the Judge's chamber where Mr. Abbott was and Mr. Chevrier was and the red envelopes were lying on the table. Mr. Button, as I recall(inquired of somebody as to what statement he had made with reference to the exhibits and Mr. Katzenbach, as I recall undertook to explain the situation to Mr. Button and the others present, making a statement and Mr. Button inquired of Mr. Abbott if that was his contention and Mr. Abbott said I prefer to make my own statement and proceeded to make a statement. The effect and substance of this was that he had stated to Mr. Button that nothing but exhibits or at least those that had been read should go out, and Mr. Button immediately said in substance that is not the fact, and stated that

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9082 Mr. Abbott had agreed that all of the papers should go out. I immediately said that is my recollection of the arrangement. Thereupon some further conversation occurred between Mr. Abbott and Mr. Katzenbach, the first of which was the reference to whether or not Mr. Abbott would stipulate as to what papers might be returned to the jury. Mr. Abbott said that he would make no stipulation and would do nothing in the premises and thereupon some further conversation occurred between Mr. Abbott and Mr. Katzenbach, it was not a very pleas-
9083 ant thing and we retired from the ante-room to the court room. A short while after Mr. Abbott came to the court room and some one produced the Powis valise and the exhibits or papers in the valise were the subject of discussion, and Mr. Abbott gave his judgment as to what papers were exhibits and what were not and repeatedly stated that he would assume no responsibility with reference to whether they were or whether they were not. Th Court about that time came upon the bench to dispose of some criminal matters and when he had disposed of them retired to his chamber. And Mr. Button Mr. Katzenbach and myself then concluded to go
9084 into the Judge's chamber and Mr. Abbott I think was advised we were going in. We went into the Judge's chambers and Mr. Button was the spokesman and stated to the Judge——

Q. Was Mr. Abbott there? A. Mr. Abbott came in shortly afterwards, whether he came in voluntarily or whether the Court requested that he be called in, I am not certain. At any rate when Mr. Button made his statement, Mr. Abbott was there. Mr. Button stated something to the Judge with reference to the contention of Mr. Abbott that the papers had gone out and Judge Rellstab said in substance as I remember, I don't see how that is going

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to help me any. Judge Rellstab inquired of Mr. Button if papers not exhibits had gone to the jury, and Mr. Button replied that was a difficult question to answer and rather difficult to say just what the status of some of the papers in the case was. Some further remarks were made and Mr. Button made the statement that so far as the defendants were concerned Mr. Abbott could send back the whole or any part of the exhibits. Judge Rellstab said then in substance I suggest that you take that course, Mr. Abbott, or is that course satisfactory. Mr. Abbott, one or the other or something of that nature, and Mr. Abbott stated "I will not, I don't care to assume any position in the matter, I will assume no responsibility in the matter." That is about all that occurred. Then the Judge intimated that he had other work to do, and we took it as an invitation to——

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Q. To retire? A. To retire.

Q. Had you observed Mr. Abbott segregating the exhibits? A. In the anteroom?

Q. In the anteroom. A. Yes, Mr. Abbott was doing something with the exhibits but I paid no attention to that.

Q. Was that before or after you saw Judge Rellstab? A. That was before we went into to see Judge Rellstab.

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Cross examined by Mr. Satterthwaite:

Q. Mr. Laffey, you stated how the counsel and the clerk were grouped after the Judge's charge had been completed and the Judge had retired from the room. I think you said you wouldn't be sure where Mr. Chevrier was? A. Not his exact position, I wouldn't undertake to say his exact position, he was standing in the group.

9088 *John P. Laffey—Cross*

Q. Wasn't he at the far end, nearest to where the Judge's desk is? A. He may have been, I wouldn't undertake to place him.

Q. Did you see the pile of letters on his desk? A. There was a pile of papers on his desk, in fact, all the exhibits had been kept on the desk for several days.

Q. Was Mr. Button at that part of the desk where these papers were? A. Yes, in front and to the right of Mr. Katzenbach.

Q. To the right of Mr. Katzenbach? A. To the
9089 right of Mr. Katzenbach.

Q. Then we understand that with reference to the Judge's chambers, which side, was he facing? A. Mr. Button was facing the Judge's chambers.

Q. As to his position? A. So there would be no doubt about it, Mr. Button was facing where the Judge sat during the trial.

Q. And standing at the end of the table. A. No, standing at the front of the table. Mr. Katzenbach was sitting in the chair on the raised platform where the clerk Chevrier sat a good part of the time.

Q. What was the first that was said about the
9090 papers going out that you recall? A. You mean at this table?

Q. Yes. A. The discussion was had between counsel.

Q. You don't remember that discussion, the nature or the subject of it? A. There was reference to the difficulty in determining just what was read in evidence and what were not. Q. Did any one say anything about some of those papers not having been marked as exhibits that were on that table? A. The remark that I remember distinctly was made by Mr. Button that it would be difficult to determine whether they were exhibits or whether

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they were simply identification without reference to the printed record, and that was the occasion of Mr. Abbott's statement that he had no objection to their all going out.

Q. What called forth that remark from Mr. Button, what called that forth, do you remember? A. I don't recall what called forth.

Q. Didn't Mr. Abbott's remark that there were papers there that weren't marked and he didn't want any to go out that were not marked, and he didn't want any to go out except those that were marked as exhibits? A. Mr. Abbott may have remarked that, I know that there were papers there marked for identification and exhibits but Mr. Abbott never said in my presence that he wanted nothing to go out that weren't exhibits.

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Q. Did he remark that there were papers there that weren't exhibits and was that what called forth the remark from Mr. Button to which you testified that it would be difficult to separate them? A. I don't recall Mr. Abbott making such a remark, he may have made such a remark.

Q. Now you have said that Mr. Abbott said, to the effect that he saw no objection to their all going out, can you recall Mr. Abbott's exact words? A. Those were his exact words, I have no objection to their all going out. Q. Did he say all what going out? A. I have given you his word.

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Q. Do you know whether he referred to all the exhibits or to all papers, do you know which? A. We were separating a pile of papers on the clerk's desk, we undertook to separate, we were at the work.

Q. What was Mr. Abbott doing at that time? A. He was standing at the end of the desk, as I remember.

Q. Now are you sure who it was said something

about sealing the books? A. Mr. Abbott spoke of sealing the books.

Q. Was he the first one that spoke of it? A. I have given you that conversation, shall I give it to you again?

Q. I think you testified that Mr. Button gave his consent to the sealing of the books and I asked whether it was Mr. Button or Mr. Katzenbach, if you recall it? A. Mr. Abbott, after Mr. Button had stated to Charlie Chevrier that the papers could all go out, and Mr. Charles Chevrier had started
9095 to put them in these envelopes as I have said, Mr. Abbott then brought up the matter of getting some exhibits in the green book out, and he stated as I have heretofore testified that if those papers were going out I would like to have these exhibits in the green book, and Mr. Button said well, why don't you cut them out, and Mr. Abbott then stated that he didn't like to mutilate the book, would it be satisfactory if he would seal them up, that is the first time the suggestion to seal up the books was made in that connection.

Q. That was while the Judge was on the bench or after he left it, this sealing up of the books? A.
9096 After he had left, in fact, that was the last agreement we made with Mr. Abbott, the sealing up of this green book.

Q. Do you recall anything he said while the Judge was on the bench about the sealing up of these books? A. There was something, and that shows on the record, and resulted simply in the stipulation relative to the Rice list.

Q. In the discussion about those papers on the desk was there anything said specifically about letters being there that were not marked as exhibits? A. Not that I recall.

Q. What arrangement was it you say Mr. Abbott

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quoted to Mr. Button, you said he quoted some arrangement to Mr. Button in the Judge's anteroom. A. The substance and effect of it was that he had stated to Mr. Button that he didn't want any papers that were not exhibits to go out, that was the substance of it, I wouldn't undertake to recall the exact language?

Q. You don't remember his exact language? A. Mr. Button immediately took issue and the further conversation that I have detailed occurred.

Q. Was it Mr. Button or Mr. Katzenbach that took issue with that? A. Mr. Button took issue with that.

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Q. Did Mr. Katzenbach say anything with regard to the occurrence or otherwise of Mr. Abbott's statement when you were with the Judge about any papers going out except exhibits? A. Mr. Katzenbach got in the conversation immediately after.

Q. What did Mr. Button say? A. In what connection?

Q. You say that Mr. Button took issue, what did he say, do you remember? A. Mr. Button said in substance that is not the fact.

Q. You don't remember his language? A. I can't, I wouldn't undertake to give his exact language, but he said in substance, that is not the fact, there was an understanding or agreement that all the papers should go out, and I immediately stated that is my recollection of the understanding.

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Q. Do I understand you, Mr. Laffey, to say that Mr. Button said to Mr. Chevrier I have no objection to all the papers going out? A. No, I don't want you to have such understanding.

Q. I did have such understanding, how did you say that? A. He said that, the gentlemen were surrounded around that desk, and in answer to the suggestion it would be difficult to separate those papers without reference to the printed record.

9100 Q. Was Mr. Chevrier present among those gentlemen who said this? A. Yes, sir.

Q. Did you hear Mr. Abbott say anything to the effect that he didn't care whether your exhibits got out or not? A. I never heard Mr. Abbott make any such statement.

Q. You never caught any of that? A. I never caught any of that.

WILLIAM H. BUTTON, a witness produced on be-
9101 half of the defendant, being duly sworn according to law, testified as follows:

Direct examination by Mr. McCarter:

Q. You were in court when Judge Rellstab finished his charge to the jury? A. I was.

Q. And you cross examined Mr. Waddell? A. Yes.

Q. Did you have in mind some colloquy that had taken place between the Court and counsel with reference to additional letters other than those that were actually marked as exhibits? A. I have had
9102 it generally in mind, yes.

Q. Now, please state in your own way your recollection of all that occurred touching the matter of the exhibits that were to go to the jury after the judge finished his charge. A. Well, after the discussion with reference to the Rice list, which resulted in some arrangement that copies should be made and submitted to the clerk, it seems to me it was also to be submitted to some of us, but I may be mistaken about that, the judge got up and stated in effect after the charge that counsel must agree upon the exhibits and see that they went to the jury, otherwise I will have to settle it myself, and

he went off the bench. Immediately after he left the room we went up to Mr. Chevrier's desk, a small desk at one end of the judge's bench and where all these exhibits were, Mr. Katzenbach, Mr. Laffey and myself, Mr. Charles Chevrier and myself and Mr. Abbott, and Mr. Abbott had one of the green Government records in his hand. Mr. Katzenbach, as I recall it, first took up from the desk a deposition which turned out to be the deposition of Mr. Luthy and turned to the book and said, "here are some letters attached to this deposition" and showed them to me and I said, "yes," and he laid 9104
it down, and sat down in Mr. Chevrier's chair and in front of him were a large bunch of Waddell letters and some miscellaneous papers, other papers, I don't know what they were. It was on the desk on which the exhibits had been kept for weeks and then Mr. Katzenbach then began to take off these Waddell letters one by one and put them in other piles, and he took about a half a dozen of them off when I think, when I asked him "how are you going to do this?" And he said "I think you will have to go through all these papers and pick out anything not marked as exhibits." I then remarked that I think that will be a difficult thing to do, be- 9105
cause I assume there are some documents you can't tell whether they are actually in or not without examining the record, and it will be a long job. He said he thought it would be a long job, whereupon Mr. Abbott said "we see no objection to their all going to the jury." I immediately turned to Mr. Laffey and asked him if we had any objection, I saw none myself, and he said "no," and Mr. Katzenbach said "let them go," and then I said "let them all go." Mr. Chevrier at that time, according to my recollection, was standing right back of Mr. Abbott and he said "very well, we will put them all

9106 in red envelopes and send them out," and walked over to his chair, and Mr. Katzenbach got up and began to pick the papers up and commenced putting them into these envelopes. Then Mr. Abbott held out his green book, and said if all these are going to the jury, I think the rest of the exhibits, the green books, should go, particularly the Rice-T. C. du Pont negotiations, or he referred to those negotiations, and said "what can I do about that?" Well, I suggested that he cut the pages out and send them in, he said he could do that, but it seemed
9107 to be unnecessary and he would like to avoid mutilating his books, would we not agree that the rest of the books should be sealed up and sent in. Well, I turned to Mr. Laffey and he assented and I said I see no particular objection to that; I doubt if there is anything in the book anyhow to hurt anybody, and he said "will it be satisfactory if I do the sealing up myself?"

Q. Who said that? A. Mr. Abbott. I said I have no objection, and we left. We stopped the work and went to lunch. In the meantime, either immediately before or in the early part of it, the episode about the lunch came in. Judge Rellstab
9108 came out and had his overcoat on and said that some arrangement should be made about the lunch for the jury. It was agreed that Mr. Chevrier should furnish the lunch and should be reimbursed by the two parties equally, that is about my recollection.

Q. How close were you all together? A. All in an immediate group, any one of us could touch this little table, it was a small table.

Q. You went out to lunch. What was the next thing that occurred so far as your information goes as to things? A. I heard nothing more about it until the next morning, the jury was still out, about

ten o'clock or a little later, Mr. Laffey and I went over to Mr. Katzenbach's office and we sat there and a telephone message came and Mr. Katzenbach was wanted at the Judge's chambers. That some objection was being made with reference to the exhibits. He immediately went over and Mr. Laffey and I immediately followed him over there, and Mr. Katzenbach was inside, and sat down in the court room and almost immediately Mr. Katzenbach came in and said Mr. Abbott had been in and objected to the situation to Judge Rellstab on the ground that some of the Waddell letters, as I re- 9110
call it, had gone into the jury, that they were not in evidence and that he objected, at least called to the attention of Judge Rellstab, and stated to the Judge that he had cautioned me not to let anything go in to the jury that was not an exhibit. Well, we had some conversation on that subject then, and Mr. Katzenbach wanted me to go in and give the Judge my version of it. I told him I was willing to do that and we three, Mr. Laffey, Mr. Katzenbach and myself, went into the ante-room and there Mr. Abbott was over by the window, as I recall it, and we stood there, and Mr. Katzenbach said, now Mr. Button Mr. Abbott stated to Judge Rellstab, and he 9111
detailed his version of what was said, and I turned to Mr. Abbott, and I said, "is that your statement?" And he said, "I will make my own statement, is it not a fact that I didn't want any exhibits to go to the jury," I think he mentioned the letters, the Waddell letters, that were not in evidence, and I said that is not the fact we all agreed that these things should go to the jury, and Mr. Laffey immediately broke in and said that was his understanding, and then Mr. Katzenbach remarked that he hadn't said anything about it, he had already had his conversation on the Judge's room, according to

9112 his report to me, but he proposed to Mr. Abbott, "well, what do you want to do about that? Will you stipulate that special parts of these papers go back to the jury as we select, and nobody take advantage of the situation." And Mr. Abbott said he would make no agreement, whereupon we walked back into the court room and Judge Rellstab came out to attend to some criminal matters and stayed on the bench, and we said among ourselves outside, we had better take it up with the Judge, and I started to one side, I think, and Mr. Katzenbach said we
9113 are going in to talk it over with Judge Rellstab, will you come, or come if you desire and he did come shortly after, he followed along in and we went in there and had some little conversation and there were other matters for the Judge and then he said, "are you all here," and we did seem to me, and we all sat down, or many of us did. The Judge wanted to know what we wanted, and I said, that Mr. Abbott had made some statement or stated that an arrangement had been made with me with reference to the exhibits and I desired to tell him what occurred, and he said that he didn't see that that helped him any and then I said all right, and then
9114 he said, "did any papers that were not exhibits go into the jury room." I said "that was a very difficult question to answer for the reason that it was true that some of the Waddell letters went into the jury room that were marked only for identification; that the state of the record in regard to those letters was such that I was not prepared to say whether they were exhibits or not. I thought they well might be exhibits, although only marked for identification, and according to my recollection of what occurred when they were put in.

Judge Rellstab said, you are objecting because they went in. I said no, we are not objecting, Mr.

Abbott is the man who objects, we are willing to have all go in, part of them or none. Judge turned to Mr. Abbott and he said, "why isn't that satisfactory to you," and he said he didn't care to make any agreement about it or take any responsibility in the matter, "I merely call the situation to the attention of the court." He went out after the Judge said he had other matters to attend to, into the court room, and Mr. Chevrier was there and Mr. Abbott took out all these red envelopes on the counsel table in the court room which we had used during the trial, a number of them there, and Mr. Abbott sat down and opened them up and began to examine them, and Mr. Chevrier wanted to know what he was going to do, and I think I said I don't know what you are going to do about it, we will say what we said to the Judge, we have no objection to all these papers going back to the jury, part of them going back or none going back, that is the last I heard of it. 9115 9116

Cross examination by Mr. Satterthwaite:

Q. Mr. Button, the discussion while you were around this table of Mr. Chevrier's with regard to the manner of separating the exhibits was confined to letters, as I understand? A. Well, that depends on what you mean by letters, of course I made that remark, I thought it was difficult to separate them correctly without referring to record. I did state though I can tell you why I thought that. 9117

Q. I understand you that Mr. Katzenbach had commenced separating letters that were exhibits from those that were not exhibits? A. As I understood it.

Q. And then you said to him, "how are you going to do it?" And Mr. Katzenbach replied I suppose

9118 we will have to go one by one or words to that effect? A. Go through them, he said.

Q. I understand you, Mr. Abbott said he didn't care if they all went in, that was the sequence? A. Except there was nothing specified about the letters.

Q. That is the sequence? A. That is the sequence as I recollect.

Q. The subject matter of the conversation were the letters Mr. Katzenbach was separating? A. The subject matter of the conversation was how we were going to get these exhibits in shape to go to the
9119 jury. Mr. Katzenbach was at the moment engaged on the Waddell letters.

Q. And you were asking him how he was going to separate them, he was then engaged in separating these letters? A. My remark was how are you going about to do this.

Q. What was he doing, was separating the letters? A. At that time, separating the Waddell letters.

Q. Mr. Abbott's remark, if he made the remark you speak of, was addressed in response to the remark Mr. Katzenbach just then made, stating he would have to go over them one by one or words to
9120 that effect? A. No, that was not it. That response followed after my remark that it would be necessary to compare or consult the record in the case in order to do this that was a sequence, that was after that.

Q. The remark was from Mr. Katzenbach? A. A. That is my recollection.

Q. Did you remark that you didn't think it would be necessary to arrange anything, it didn't make much difference? A. I remarked something of that sort with reference to the green book, I may have about the letters, I may have, that was my thought on the subject.

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Q. Did you go over to the end of the table where these letters were and start to pick them up? A. I touched no papers except the Luthy exhibit, Luthy deposition, during the whole performance.

Q. I don't mean sort them over? A. I didn't touch them.

Q. Didn't the taking up of these start a discussion? A. No, the discussion started when I asked Mr. Katzenbach how he was going to do this thing.

Q. When you were discussing about the exhibits in the green book, did you say you thought the du Pont negotiations ought to go in? A. No, Mr. Abbott stated he wanted the rest of the exhibits, if all of these papers were going in, he wanted the rest of the exhibits in the green book, and said that he particularly desired to have some of the T. C. papers go in.

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Q. You said, the rest of the exhibits, had any of the green book exhibits been stated at that time? A. All I know about if the Rice list in the green book concerning which arrangement had been made to paste, the Judge left the bench.

FRANK S. KATZENBACH, a witness produced on the part of the defendants, being duly sworn, testified as follows:

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Direct examination by Mr. McCarter:

Q. Mr. Katzenbach, I would be glad if you will detail all you know touching those exhibits and the dispute about them, from the time of the Judge's charge. A. Well, after the Judge charges the jury, there was a discussion while the Judge was upon the bench between Mr. Abbott and myself with reference to the green books, especially a list of con-

9124 tracts contained in one of those volumes known as the Rice list. The discussion ended in a stipulation made between Mr. Abbott and myself that a copy of the Rice list was to be handed to Mr. Charles Chevrier and submitted to the jury. Then Mr. Charles Chevrier went up to the Judge and then Judge Rellstab stated that the counsel would have to agree upon what exhibits should go to the jury, and if we couldn't agree, that he would be in his chambers to pass upon any exhibits that might be in dispute. Immediately after that the Judge left the bench and
9125 counsel immediately gathered about the desk that had been used by Mr. Charles Chevrier and I presume would be called the Clerk's desk. It is a desk that is upon an elevation from the main floor in that portion of the court room within the bar. I sat down in Mr. Chevrier's chair and Mr. Button stood to my right, and Mr. Laffey was at Mr. Button's right, but standing a little ways behind him. We three were facing where the jury sat during the trial, and Mr. Abbott was on the main floor of the court room, at the corner of the desk that would be called the southeast corner. He was about, I should judge half way from the desk. Mr. Chevrier
9126 as I recall it, stood on the elevation and about opposite where I sat, a little bit nearer to the southeast end of the desk, but taking such a position that I could see Mr. Abbott and did see Mr. Abbott during what followed. The exhibits in the case were upon this desk and had been there for some time, several days, if not longer, perhaps a week or so, and I was sorting over the papers on the desk. I had examined some letters that were affixed to depositions that had been taken upon my first trip to the west and which contained the deposition of Mr. Ferdinand Luthy of Peoria. Then I started in with the Waddell letters and was separating the

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Waddell letters, putting in one group those which didn't have the identification clause crossed off. Mr. Button said to me out loud, "how are you going to do this?" or something to that effect, and I said it would be a long and difficult task, and Mr. Button said, "well, he said we will probably have to consult or refer to the record in the case, in order to determine what are exhibits and what are not. Thereupon Mr. Abbott said I can see no objection to all these going in, and Mr. Button said to Judge Laffey, made a remark to him which as I recall was that he could see no objection to them and I said I 9128
could see no objection to them. While I was sitting in the chair and before this conversation had been completed Judge Rellstab came into the room with his overcoat on and stated that the Government made no provision for the supplying of meals to the jury that he had promised the jury their lunch and then the suggestion was made that counsel supply the jury with their meals and that the expense of it be divided. I immediately after the statement of Mr. Abbott that he saw no objection to all of them going in and Mr. Button's remark to Mr. Laffey, and my remark, Mr. Charles Chevrier said that he would put all of the exhibits in these large en- 9129
velopes, and they were so produced at that time by Mr. Robert Chevrier, three or four large red envelopes. There already had been a pile, there was already a large pile of large red envelopes, if not identical of a similar character on the desk in which had been placed the contracts that had been offered in evidence, they were to the extreme right as I had been sitting at the desk. Then all of the exhibits had been gathered up as I recollect it by Mr. Charles Chevrier and Mr. Robert Chevrier, and placed in these envelopes. The gathering of the exhibits and placing them in these envelopes occupied only about

9130 a minute or two, and during that time, Mr. Abbott, who had been standing in the same position during the entire time, then said if all of these are going in, I want the green books to go in also. Then the suggestion was made, I think, by Mr. Button, that the portion of the green books that had been offered in evidence should be cut out, Mr. Abbott made the remark that it was the only set that he had and he didn't like to mutilate it and would it be satisfactory if he sealed them up. Mr. Button said that he saw no objection to that and my recollection is that
9131 I said that I saw no objection to it, and that closed the interview. The desk had been cleared of all the exhibits, they had all been placed in the envelopes, and my recollection is that while the discussion about the green books was in progress that they had been handed to Mr. Van Horne by Mr. Robert Chevrier, Mr. Van Horne having come into the room.

Q. That is the envelopes had? A. Yes, sir; the envelopes had.

Q. In which all of the exhibits were? A. And also the contracts. I then left the court-room with Mr. Button, Mr. Laffey and Mr. Turner, is my recollection, and I think that Mr. Graham and yourself
9132 had preceded us by a few seconds out of the court-room. I heard nothing further regarding this matter until I was in my office at 10 o'clock on the morning following, when I received a telephone message to the effect that some question had been raised regarding the exhibits and would I come over to the Judge's office immediately. Mr. Laffey and Mr. Button were in my office at the time; I stated to them where I was going and I preceded them out of the room and came over to the Federal Building and went upstairs through the court-room into Judge Rellstab's work room or clerk's office. Mr. Charles Chevrier came in at that time and Mr.

Abbott came in; we got there almost simultaneously, and Judge Rellstab was sitting at his desk and Mr. Abbott occupied a chair to the left of Judge Rellstab. I sat down in a chair to the right of Judge Rellstab, and then Judge Rellstab asked Mr. Abbott what the matter was, and Mr. Abbott said that there were letters or that he thought there were letters had gone to the jury that ought not to have gone and repeated a conversation that he had with Mr. Robert Chevrier at the station a short time before, about an hour before, I presume it was. I then made the statement that there had been an agreement that all the letters, all the papers should go to the jury and Mr. Abbott then stated that he had an agreement with Mr. Button respecting the matter. That ended the conversation so far as I was concerned except that Judge Rellstab then said Mr. Abbott that if there was any one that did know or should have known what papers should have gone to the jury, he was the one, as he had expressly charged counsel with that duty, and then he summoned, I think, Mr. Chevrier to get Mr. Van Horne to come and Mr. Van Horne came to the room, standing within a few feet, and he said to him he wanted him to go to the jury room and get the exhibits. Mr. Van Horne asked whether the green books and the maps should be brought out, and he said no, and then Mr. Abbott, Mr. Chevrier and myself passed out into the room and Mr. Van Horne met us, as I recollect it in the outer office with an armful of these red envelopes and other envelopes were there and my recollection is that three of the large bunches in which the exhibits had been placed the preceding day. Then I passed out into the court-room and met Mr. Laffey and Mr. Button and then came back into the outer room where the large envelopes were and where Mr. Ab-

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9136 bott and Mr. Chevrier were, I had previously given the substance, in the court-room of the conversation that had occurred in Judge Rellstab's office to Mr. Button and to Mr. Laffey, and then upon reaching the outer room of Judge Rellstab I repeated what had occurred before Judge Rellstab and Mr. Abbott stated that he preferred to make his own statements. He thereupon made a statement that he had agreed with Mr. Button that none but papers that had been offered in evidence should go to the jury, which Mr. Button said was not so, and Mr.
9137 Laffey thought it was not so. Then the suggestion was made by me that if Mr. Abbott desired we could go through the exhibits or having them before us could agree upon what should then be sent back to the jury and enter into a stipulation that neither side should be affected by what had occurred and Mr. Abbott said he would make no such stipulation at all, and then we passed out to the court-room again and Judge Rellstab came on the bench and disposed of some criminal matters while we were then in the court-room Mr. Chevrier produced a valise called Mr. Powis' valise and that was opened, there were some letters and bills in that valise
9138 and also a certified copy of the charter of the Buckeye Powder Company and one or two other documents relating to the Buckeye Powder Company. I made the remark we might go through the other envelopes, they were also opened in the outer court-room and casually looked over; they contained exhibits, letters and papers of different kinds; and then Mr. Laffey, Mr. Button and myself, we wanted to go into the Judge's room and speak to Judge Rellstab about it, and when we passed into the room we met Mr. Abbott or he was sent for; my impression is he was in the Judge's outer office at that time, and we all went into the clerk's office of Judge Rellstab; and Mr. Button made a

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statement with reference to what had been said and Judge Rellstab asked whether there were any papers that had gone to the jury that had not been put in evidence. Mr. Button replied that owing to the state of the record it was a very difficult thing to tell and then Judge Rellstab asked whether he was making any objection and Mr. Button said no, that we were perfectly satisfied to let them all go back or to keep out any that Mr. Abbott desired and the Judge then asked Mr. Abbott whether that would not be satisfactory, and Mr. Abbott said that he would take no position in the matter and would

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assume no responsibility. Then we all sat there without anybody saying anything for some seconds, possibly a minute or two, and Judge Rellstab said, "Well, gentlemen, I have some other work to do," and we all took the hint and left.

Q. I show you P 3, which has been produced and stated to have been found among the exhibits; tell us what you know about that document. A. On the Thursday of the week preceding that upon which Judge Rellstab charged the jury and at the time of the conclusion of Mr. Abbott's argument and after, I think, the jury had been dismissed until the following Tuesday, Judge Rellstab asked Mr.

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Abbott and myself to step up to his desk and stated that he would like to have the assistance of counsel in any matter that they could be of assistance to him during the next few days, and asked whether we would be in town. Mr. Abbott said it was not his intention to remain in town, but he would remain in town, and I said I would be in town. On Monday, the 23d of February, about 10 o'clock in the morning, I received a telephone message asking if I wouldn't go over to Judge Rellstab's office, and he said there were some questions that he would like to have me look the record over and furnish

9142 him the evidence that would be answers to those questions. He then told me what those questions were. I telephoned from Judge Rellstab's office to my office and asked Mr. Gildea, who is in my office, to come over to the Federal Building. I found that the record in the case had been removed from the room in which I had left them to this, the Grand Jury room, in which we are now sitting, and I came up here and shortly afterwards Mr. Gildea came in and I asked him to go down to Judge Rellstab's office and ask Judge Rellstab to dictate to
9143 him the questions he desired to have answered. Mr. Gildea came back and I asked him to write out at the head of certain pieces of paper that were about this room the questions which Judge Rellstab had asked and then wrote out those answers to the questions at the top of this Exhibit P 3, constituting the first two and one-half sheets, these were the questions which he wrote out. I then during the course of the entire day wrote out for Judge Rellstab these answers to the different questions, using copies of exhibits necessary that I had, and also using the evidence which had, as I stated, been left by the counsel in the building and placed in the
9144 room on the third floor which had been removed to this room. The other questions asked while taking considerable time to search the record, didn't take as much time to prepare as Exhibit P 3, and about 5 o'clock in the afternoon, this paper P 3 was finished, and I went with it to Judge Rellstab's office and delivered it in person to Judge Rellstab in his inner office and at the same time explained to Judge Rellstab the method I had used in making up this paper.

Q. When did you next see it? A. I next saw it in the Clerk's office on Thursday; I will consult this calendar; I think it was March 26th; yes, on Thurs-

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day, March 26th, in the office of the clerk. I asked Mr. Chevrier if I could see the papers that had been referred to in the affidavits used upon the rule in this matter, and he said that Mr. Robert Chevrier had them and he asked Mr. Robert Chevrier in my presence to get them. Mr. Robert Chevrier brought them in the small office occupied by Mr. Charles Chevrier, and I there saw them, which was the first time I saw it after placing it in Judge Rellstab's hands at about 5 o'clock on the afternoon of February 23d.

Q. You were away from Trenton from what time to what time? A. I left Trenton at 5 P. M. on 9146
February 27th, and I returned to Trenton on March 24th in the afternoon at 4.30.

Cross examination by Mr. Satterthwaite:

Q. Mr. Katzenbach, you spoke about having envelopes which contained the contracts, do you mean envelopes after Mr. Van Horne had brought the exhibits from the jury room or before they were taken out, to which do you refer? A. There were envelopes containing the contracts on Mr. Chevrier's desk with the other exhibits in the case prior to their submission to the jury and Mr. Van Horne also 9147
brought the same envelopes I presume, brought them out again with him when he brought the other three or four large envelopes which contained the other exhibits that had been put in those envelopes from Mr. Chevrier's desk.

Q. Do you know or did you only assume that he brought out the envelopes which contained the contracts when he brought them from the jury room? A. I saw them.

Q. Did you examine them to see what they were? A. I could see, I didn't open any of the envelopes containing contracts.

9148 Q. How many did you notice he brought out? A. I couldn't answer, but I judge there was twenty or more, they weren't very thick, that is containing probably many papers each, but they were a large number of envelopes.

Q. Were there red file envelopes with papers in them on the clerk's table before you gathered up the papers after this conversation and put them in some envelopes? A. I couldn't say as to that, I didn't pay sufficient attention to the putting of them in the envelopes except I know the desk was cleared.

9149 Q. Do I understand you, Mr. Katzenbach, that you say these envelopes were handed to Mr. Van Horne by Mr. Chevrier while Mr. Abbott was present? A. My recollection is that Mr. Robert Chevrier handed them to Mr. Van Horne in the court room while Mr. Abbott was present.

Q. Are you sure he was present then? A. Very sure.

Q. What was the agreement that Mr. Abbott said that he had had with Mr. Button? A. Mr. Abbott in the Judge's inner room didn't specifically say what the agreement was, he said he had some agreement with Mr. Button respecting the Waddell

9150 letters.

Q. Mr. Button made what remark? A. Mr. Button respecting the Waddell letters.

Q. What was it that you say Mr. Abbott told Mr. Button as to the agreement with him? A. While in the outer room of the Judge's suite of offices Mr. Abbott made a remark to Mr. Button that he had an agreement with Mr. Button that nothing that had not been offered in evidence should go in, or words to that effect which Mr. Button immediately denied and said there was no such agreement.

Q. With regard to the conversation in Judge

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Rellstab's chamber where Mr. Abbott remarked to the Judge that he would take no position, do you remember that was the word, or did he say he would take no responsibility? A. My recollection is that he used both words, he said he would take no position in the matter and assume no responsibility.

Q. You remember the latter clearly, that he said he would assume no responsibility? A. I recall, I certainly recall his stating that, yes.

Q. Do you recall his asking the Court to make an order? A. No, I do not.

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Q. Now, in this conversation around the table, Mr. Katzenbach, you were sorting over these letters when this occurred, separating the letters? A. I was separating the letters at the time the conversation commenced.

Q. You were sorting the letters when the conversation ended? A. No, I was not, I had ceased.

Q. You had not taken up any other papers to separate? A. No, sir, I had prior to that taken up other papers.

Q. And during this conversation, during the making of these remarks between Mr. Button, yourself and Mr. Laffey, and leading up to Mr. Abbott saying as you have stated, he had no objection to that going in, it was the letters you were then engaged in separating? A. I was actually engaged in sorting the letters but the conversation I have referred to, the word "letters" was not used in the conversation.

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Q. I was asking you about letters, the thing being done was sorting? A. I was sorting the Waddell letters.

9154 *John P. Laffey—Recalled—Direct*
William H. Button—Recalled—Direct

JOHN P. LAFFEY, recalled.

Direct examination by Mr. McCarter:

Q. Mr. Laffey, I show you exhibit P-3 and ask you when you first saw that paper? A. Within the last ten days, I can fix the date more accurately if——

Q. Did you prior to that time know of its existence? A. I did not.

9155 Not cross examined.

WILLIAM H. BUTTON, recalled.

Direct examination by Mr. McCarter:

Q. I show you and ask you to look at Exhibit P-3 and ask you when you first saw it? A. Within the last few days.

Q. Did you hear of its existence or its preparation by Mr. Katzenbach as described by him in his evidence? A. I never heard of it or saw it.

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RICHARD SATTERTHWAITE, a witness produced on behalf of the plaintiff, being duly sworn according to law, testified as follows:

Direct examination by Mr. Satterthwaite:

Q. You are one of the jurors who tried the case of the Buckeye Powder Company vs. E. I. du Pont de Nemours Powder Company? A. Yes, sir.

Q. Do you remember after you had retired to the

jury room papers being brought to the room? A. Papers brought to the jury room?

Q. Yes. A. Yes, sir.

Q. And they were contained in what? A. They were contained in what?

Q. Yes. A. Just what do you mean, we had a box full of paper.

Q. Were they in red file envelopes? A. Like this, some of them, I think (indicating Exhibit P-4), they resembled this.

Q. Do you remember on the second day that you were out that the bailiff called and got some en- 9158
velopes and papers in them? A. I remember one of the officers coming there and asking for all the papers, I couldn't swear which ones they were and they took them out of the room.

Q. After the jury had retired and the papers in the envelopes had been brought in, what was done with the envelopes and their contents? A. When they were brought in?

Q. Before they were taken out? A. Before they were taken out, they were taken out of this and gone over by the jurors.

Q. You mean the envelope similar to P 4? A. Yes.

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Q. Do you know whether the papers which were taken out by the officer were among those which had been taken out of the envelopes by the jurors. A. The ones that were taken out were the ones that came out of these envelopes.

Q. Yes. A. I couldn't say whether they came out of the envelopes or not. I couldn't swear to that, but they were papers we had there and gone through and examined.

Q. P 2 is handed witness and he is asked if he had seen that? A. That looks to me like one we had out there, but it has been so long and we had so many of them.

9160 Q. You say that it looks like one that you had out there? A. That resembles one of them.

Q. P 3 is now handed to the witness and he is asked whether he recalls seeing that before? A. I don't know, by jove, it has been so long, I don't know whether I could swear I saw any special one out there or not. I remember reading papers that had the ninety-five cent price on, but whether this is one of them or not I couldn't say. It is a pretty hard matter for me to remember all these papers.

9161 Q. How generally were the papers examined by the jurors, Mr. Satterthwaite, by how many jurors, I mean, were the papers examined? A. By all of them as far as I could see, the papers there on the table were examined, all that were there in the court room, we supposed that was what they were there for. I don't think there was a paper there we didn't go through. So far as I know.

Cross examination by Mr. McCarter:

9162 Q. I don't suppose that you say that you personally examined every paper that was in that room? A. No, I couldn't say that I did, not every single paper that was in the room, but I went over what I supposed was all of them, of course I couldn't swear that I examined every paper that was in the room, not every one of them, yet I might have done.

THYMAN O. ABBOTT, recalled in rebuttal:

Direct examination by Mr. Satterthwaite:

Q. Mr. Abbott, in the conversation which took place around the clerk's desk did you remark to

Mr. Button or any one else there that you had no objection to the papers on that desk going out? A. I never did remark that to either of these gentlemen or any one in substance, on the other hand, I said once at least, and I think I said twice that I did not want any papers to go out that had not been admitted as exhibits.

Q. Did you state after the papers had been brought back that you had an agreement with Mr. Button? A. I don't remember whether I used the word "agreement." I stated that according to my recollection at this moment that I had told Mr. 9164
Button just what I said here, that I did not want any papers to go to the jury room that had not been admitted. I did not understand it had been in the nature of an agreement; I simply stated that to be a fact. I don't recall whether Mr. Button said I had not made that agreement or not as the others have testified that he did say. I know that Mr. Katzenbach said I had made an agreement but I denied that to him that I had made such an agreement.

Q. Did you say to Judge Rellstab that you took no position in regard to the papers going out again? A. I didn't use the word "position," I said that I 9165
would take no responsibility in the matter and stated that I had separated the papers as best I could, but that I didn't care to assume any position, any responsibility in the matter.

Q. Did you remark with reference to the exhibits in the green book, " if those exhibits all go out then I want these to go out too"? A. I said something about the exhibits in the green book going out, while we were talking about pasting them down, but just what that was I don't know, but I am sure I never coupled it with any statement that if certain other papers went out these were to go out.

I wanted to have the exhibits go out and there was no particular objection that I discovered on the part of counsel on the other side, to my pasting them down, when that was suggested that was very readily acceeded to, to my surprise.

Q. Were you present when Mr. Chevrier, Robert Chevrier, handed those envelopes containing the papers to Mr. Van Horne? A. I don't think I was. I am absolutely sure I was not present there when the desk was being cleared of the documents. I didn't see the papers being gathered up by the clerk
9167 and my recollection is that I heard some sort of remark made by Mr. Charles Chevrier to his brother, that he desired to put them up, but whether I remained until he came back or not, I couldn't say, and I was not there when the desk was being cleared.

Q. Is there anything further you wish to state, Mr. Abbott? A. Yes, I want to say this, that my attention was called to the matter of the possibility of those papers being taken out that had not been admitted first by my seeing Mr. Button over at the corner of the clerk's desk where there was a pile of these letters with his hands on them very much like
9168 this (illustrating) sort of picking up the bunch which caused me to make the remark which I did, and it was after that remark that he turned around to Mr. Laffey who was immediately behind him.

Cross examination by Mr. McCarter:

Q. Mr. Katzenbach was sitting down sorting some papers, wasn't he? A. I didn't see Mr. Katzenbach sorting some papers, he may have been, I wouldn't say that he was not. When I was talking to him about the green books he was standing up at the end of the desk and I was standing almost

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opposite him, he may have been sitting; I wouldn't say that he was not, and he may have been sorting the papers! I didn't see him doing it.

At this point the hearing was adjourned until 5.30 P. M., at the office of Mr. Satterthwaite, in the American Mechanics Building.

HAROLD VAUGHN, a witness produced on the part of the plaintiff, being duly sworn according to law, testified as follows:

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Direct examination by Mr. Satterthwaite:

Q. Mr. Vaughn, what is you employment or office? A. Personal secretary to Judge John Rellstab of the United States District Court.

Q. Do you remember on the 25th day of February that some papers in envelopes were brought from the jury room in the Buckeye Powder Company case by the bailiff, Mr. Van Horne? A. Yes, sir.

Q. Into whose room were they brought? A. Into the outer room of the judicial chambers, the first room.

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Q. Where were they deposited when they were brought there? A. I couldn't say as to where they were first placed, my first recollection of them is when they were on my desk.

Q. Do you know how many envelopes there were? A. I should say about four or five large flexible envelopes.

Q. Did you see Mr. Abbott and Mr. Katzenbach and Mr. Button in there subsequent to their being brought in? A. Yes, sir.

9172 Q. Did you hear any conversation between Mr. Abbott and Mr. Katzenbach? A. Yes, sir.

Q. Did you hear any conversation between Mr. Abbott, Mr. Button and Mr. Laffey? A. I don't recall. I simply recall hearing some conversation between Mr. Abbott and Mr. Katzenbach at that time.

Q. Did you hear Mr. Laffey or Mr. Button make any such remark to Mr. Abbott as what he said wasn't true or anything to that effect?

9173 Mr. McCarter: That is objected to as leading.

Question withdrawn.

Q. Did you hear Mr. Laffey or Mr. Button make any remark to Mr. Abbott? A. I don't recall hearing Mr. Button or Mr. Laffey say anything.

Q. Do you remember a conversation between Mr. Katzenbach and Mr. Abbott at any time? A. Yes, sir.

Not cross examined.

9174 WILLARD U. TAYLOR, a witness produced on the part of the plaintiff, being duly sworn according to law, testified as follows:

Direct examination by Mr. Satterthwaite:

Q. Mr. Taylor, you were one of the counsel for the plaintiff in the Buckeye Powder Company vs. E. I. du Pont de Nemours Powder Company? A. Yes.

Q. Were you present in the court room after the Judge's charge and the jury retired? A. I was.

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Q. Who else was there? A. Why, all the counsel that appeared for the plaintiff or the defendant, and the defendants both of them, I think, I don't remember whether Mr. Graham was there or not, but I think the rest of them were.

Q. Where were they standing? A. You mean after the Judge had left the bench, after the jury had retired.

Q. After the jury had retired. A. After the jury had retired, as I recollect it, the Judge stayed on the bench for a few moments and there was some talk between the court and the various counsel as to sending out the exhibits as I recall it, it started by Mr. Button; I recollect him standing over by a bunch of letters and he had his hand on them and he asked the Court if the letters could go out, and the Judge said all exhibits should go together.

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Q. And then what, do you remember Mr. Abbott saying anything? A. There was some conversation I think between Mr. Katzenbach, the Court and Mr. Abbott on the point raised by Mr. Abbott as to the manner in which the exhibits which were in the printed volume should go before the jury. The Court stated that counsel should agree and Mr. Abbott stated that it would be impossible for counsel to agree on anything, that brought up the subject of exhibits and the Court said the exhibits must be separated from the other matters or something to that effect.

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Q. What next took place, if you recall? A. I know we went out and pasted up those sections of the book which were not admitted in evidence and as soon as we finished that we brought them in to the clerk, that is the printed volume of the Government case I refer to. That took some time, I guess it took a couple of hours.

Q. Were you there when Robert Chevrier came

9178 in with some red file envelopes? A. That is the brother of the clerk, I don't know their given names. Yes, he passed by me as I stood there and I asked if he was busy, and he said yes, he was getting out these exhibits handed him by the attorneys for the jury; yes, that would keep him busy for some little time.

Q. Did you hear Mr. Abbott make any such remark as "I can see no objection to all these going in"?

Mr. McCarter: Objected to as leading.

9179 A. No, I was standing by Mr. Abbott and was with Mr. Abbott from the time the case went to the jury until, I don't think we were parted, may be for a few moments, we went out to lunch and during the time I was very apt to hear what was said with regard to these exhibits, I was very much interested in the matter, he made no such remark.

Q. Did you hear all that Mr. Abbott said or any one else that stood there? A. I heard every word Mr. Abbott said, everything Mr. Abbott said until we left the court room.

Q. Did you hear anything said to Mr. Abbott in the nature of consenting to anything going out that
9180 was not an exhibit? A. No, if he made such consent I would have objected to it.

Mr. McCarter: I move that that be stricken out.

Q. Is there anything, Mr. Taylor, that you wish to state? A. Well, I don't wish to state anything.

Q. Anything overlooked, I mean? A. No, I haven't given this matter any thought at all, I have been so busy with other things.

Cross examination by Mr. McCarter:

Q. Was Judge Rellstab on the bench during all this talk that you overheard, Mr. Taylor? A. As I

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say, he remained on the bench for a few minutes, and then he left the bench and the various attorneys for the defendant were around the clerk's table where the exhibits had been, and Mr. Abbott, Mr. Bartnett and myself stood near the table that we had used.

Q. How near to Mr. Bartnett did you stand? A. Mr. Bartnett came around to the end of the table and stood near Mr. Abbott and I was on the right side of Mr. Abbott, all three right together.

Q. The table you speak of is the counsel table occupied by plaintiff's counsel during the case? A. Yes, sir.

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Q. Where did Mr. Graham and Mr. McCarter stand? A. I don't remember Mr. Graham. I think I remember his being there that morning, but I wouldn't be positive he was there at the time the Judge left the bench. I don't know whether he was or wasn't, I remember him there that morning and Mr. McCarter, he was, I remember seeing him near the clerk's table, standing.

Q. Where was Mr. Katzenbach? A. Mr. Katzenbach was near the end of the table, I recollect him standing at the end of the table.

Q. Where was Mr. Laffey? A. Mr. Laffey and Mr. Button were standing on the platform where the clerk usually sits, at his table, a small table.

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Q. Where was Mr. Charles Chevrier? A. I think he was—is he the clerk?

Q. Yes. A. Well, now I don't know whether he was there with them, probably he was; I think he must have been, too.

Q. Was Mr. Robert Chevrier there? A. I think he may have been also, I don't remember; I think the clerk was there with Mr. Button and Mr. Laffey.

Q. And how near to the counsel's table were Mr.

9184 Bartnett, Mr. Abbott and yourself at the time that you have been describing? A. Within a foot or two, we were all gathered together, each could hear plainly what the other said.

Q. I understood you to say that you saw Mr. Chevrier, that you remember the envelopes, something like this P 4 which I show you going to the jury room? A. No, he is a brother to the clerk.

Q. Yes. A. Yes, this was afterwards when we came in with the book pasted up, I think.

Q. That was after the intervening space of an hour and a half or two hours, may be a little longer.

9185 A. I am not absolutely sure about that, I remember seeing the man with a book in his hands and just as a joke, I made the remark to him and by him to me, not of any consequence.

Redirect examination by Mr. Satterthwaite:

Q. Did you, Mr. Taylor, yourself consent to any papers going out that were not exhibits? A. No, I remember having talked with Mr. Abbott at that time, when the Judge asked—

Mr. McCarter: We object to the conversa-

9186 tion between Mr. Taylor and Mr. Abbott.

Q. You may answer, Mr. Taylor.

Mr. McCarter: I don't suppose that counsel for the defendant heard this conversation, Mr. Taylor?

A. I don't know, Mr. Katzenbach was right opposite us, he could hardly help hearing it. And the Judge suggested that counsel agree on the matter of sending out these books and I remember Mr. Abbott stating that we couldn't agree with those gen-

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tlemen in forty years, if he sat down here and took them exhibit by exhibit, as the manner in which these books should go. I remember he made that remark. I told him the only thing we could do, then, was to go outside and paste them all up and I remember saying that, that there might be some objection to some sides of the pages of the exhibits.

Q. You have reference now to the green book exhibits? A. To the green books, yes.

Q. Mr. Taylor, I hand you what is marked P 2 and P 3; do you know whether you had any knowledge of those going out to the jury room? P 2 is a demand for the Bill of Particulars. A. Well, I 9188
don't know that I have seen this identical paper before, if it is an exhibit, all I know about it is the back.

Q. Exhibit in this proceeding, in this matter of the taking of the depositions, not an exhibit in the case, the question is have you any knowledge of those two going out? A. What is P 3?

Q. That is marked P 3 in these proceedings here. A. I asked you what it is. P 3 I don't have any knowledge of at all; I don't think I ever saw it before, and I have no knowledge of the other paper being introduced in evidence as an exhibit or consenting in any way that it be used as an exhibit. 9189

FRANK S. KATZENBACH, Jr., recalled in rebuttal.

Direct examination by Mr. McCarter:

Q. You have heard the testimony of Mr. Taylor? A. I have.

Q. Did you hear any such remark as he testified to have made or having been made between you and

9190 Mr. Abbott in regard to the length of time it would take to agree about exhibits? A. I did not.

Q. Was any such remark made in your presence or your hearing? A. Not in my hearing, and I don't believe in my presence.

Mr. Satterthwaite: I move to strike out the latter part of the answer.

9191 ROBERT H. McCARTER, being duly sworn on the part of the defendants in rebuttal, testified as follows:

I didn't expect to be sworn in this matter because I know very little about it, but I think in view of Mr. Taylor's evidence I should state the following: After the jury was discharged into the outer room Mr. Graham and I stood one side, and I overheard some conversation between the Judge and the counsel with regard to the Rice contracts. My recollection is that at that time Mr. Abbott stood down right with Mr. Bartnett and Mr. Taylor at the counsel's desk. After that my recollection is very
9192 clear that with Mr. Graham and myself still standing on one side, getting on our overcoats, Mr. Graham was going to take a train and Mr. Bartnett, and Mr. Taylor remained down at the counsel's table, and Mr. Abbott joined Mr. Laffey, Mr. Katzenbach and Mr. Button and Mr. Chevrier at the desk on which the exhibits had been previously. I continued in the room until Mr. Abbott later left the room with the green books in his hand and then walked out with Mr. Graham immediately preceding my associates, and I feel very sure that while I didn't overhear the conversation that occurred around the table of Mr. Chevrier, this desk on which

9193

the exhibits lay, I feel very sure that a considerable time elapsed during which time Mr. Abbott was there, that those gentlemen at that table engaged in some conversation and that Mr. Taylor and Mr. Bartnett remained down at the counsel's table or near it.

Cross examination by Mr. Satterthwaite:

How far would you think Mr. Bartnett and Mr. Taylor were from Mr. Abbott when he stood up with the others, as you say?

9194

Mr. McCarter: My recollection is somewhat southwest of Mr. Bartnett and Mr. Taylor stood right by their own counsel table and the picture in my mind is that Mr. Bartnett came around from his side of the table and stood by the side of Mr. Taylor, who was standing about where he was accustomed to sit. I wouldn't undertake to measure the distance between that side and this other side of the table; we are all familiar with it.

Q. About how many feet would you think Mr. Abbott was from Mr. Taylor at that time; I don't mean a guess; I mean your best judgment? A. I would say I believe it is several feet, possibly seven or eight feet, if not more, perhaps ten feet. I have

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a mental picture of Mr. Bartnett and Mr. Taylor standing there at that regular counsel table where they sat and Mr. Graham and I stood off there and Mr. Graham had his coat and hat; they were looking at a time table and this group of gentlemen stood around the table.

Q. You and Mr. Graham intended taking your departure? A. I stayed and took lunch with the gentlemen and Mr. Graham was going; I wasn't intent on doing anything except that I was waiting to say good bye to Mr. Graham. I was not paying any attention to this conversation around the table,

9196 *Twyman O. Abbott—Recalled—Direct*

but I am quite clear that Mr. Abbott left the counsel table and came up to the exhibit table and was with this group of gentlemen, but what occurred there I could not say.

Q. Did Mr. Abbott remain there or move about? A. They all stood around that table; I have no recollection of Mr. Abbott making any move at all; he started with the green book in his hand to go out in the other room, and I think I said good bye to him as we both walked out together.

9197

TWYMAN O. ABBOTT, recalled for plaintiff in rebuttal.

Direct examination by Mr. Satterthwaite:

Q. Is there any statement you want to make? A. My statement is this: That since hearing Mr. McCarter's statement I wish to say that I did not stand all the time in one place, but I went back and forth between the corner of the clerk's desk and Mr. Taylor's desk, and I held conversation with him at the former's table and he came up to me while
9198 I was standing talking to Mr. Katzenbach once or twice and cautioned me not to make any agreement concerning those exhibits except such as would be clearly to protect our rights. I did make the statement to him that he said I did, which was that I had in mind when I said to the Court that I didn't think we would be able to agree because we hadn't had very good success in agreeing with each other in matters outside of the court; I felt as if it was going to be a hopeless task.

Mr. McCarter: Motion is now made to strike out all of Mr. Abbott's last answer upon the ground that it is private conversa

9199

tion between Mr. Taylor and himself which was not overheard by counsel on the other side.

WILLARD U. TAYLOR, recalled for plaintiffs in rebuttal.

Direct examination by Mr. Satterthwaite:

Q. Mr. Taylor, did you hear the conversation that took place at the clerk's desk between Mr. Abbott and Mr. Button? A. As I stated, I overheard 9200
every word that Mr. Abbott said there to the court or other counsel, and I remember distinctly stepping away from the position described by Mr. McCarter which is correct and taking two or three steps over behind Mr. Abbott when he was over at the corner with these gentlemen.

Cross examination by Mr. McCarter:

Q. What did you overhear while you were standing as you say two or three feet away, can you recollect? A. What did I overhear?

Q. Yes; if anything, what remarks made by anybody? A. Well, now, Mr. McCarter, this has not been in my mind five minutes since that day, the 9201
general subject was the agreement of counsel about the book, what was in the book; I know Mr. Laffey had said something to Mr. Button; I couldn't hear, and I went over near where Mr. Abbott stood there to see what was being done about the different exhibits, and I think one of the gentlemen spoke to Mr. Abbott and said that Mr. Turner had arranged them very nicely, they could be easily dealt with; I don't remember anything special. When I came from the table Mr. Abbott told us that, both Mr. Bartnett and myself.

BOTH SIDES CLOSED.

9202 **Plaintiff's Exhibit 2.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

THE BUCKEYE POWDER COMPANY, a Corporation,
Plaintiffs,

vs.

E. I. DU PONT DE NEMOURS POWDER COMPANY, EASTERN DYNAMITE COMPANY, INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY,
9203 Defendants.

Demand for Bill of Particulars.

To the Buckeye Company, Plaintiff; Twyman O. Abbott and Walter J. Bartnett, Esquires, Counsel, and McFarland, Taylor and Costello, Esquires, Attorneys for Plaintiff.

Dear Sirs:—

9204 Please take notice that the defendants in the above stated cause, the E. I du Pont de Nemours Powder Company, the Eastern Dynamite Company, and the International Smokeless Powder and Chemical Company, demand a bill of particulars of the claim of the plaintiff as set forth in the amended declaration of the plaintiff, with respect to the following matters, namely:

(1) The dates of the agreement referred to in the fourth line of Section Four of the amended declaration; the names of the parties thereto, and so much of th substance thereof as will enable the defendants to identify the same, if made.

(2) The date of the making of the alleged conspiracy of the defendants and co-conspirators, to all withdraw, excepting the defendant, E. I du Pont de Nemours Powder Company, from the Peoria field and leave the said defendant, the E. I. du Pont de Nemours Powder Company, to carry on a war of extermination against the plaintiff and drive it out of business, as set forth in Section Seven of the amended declaration.

(3) The date of the appointment of the committee (known and designated as the Peoria Committee), and the names of the persons constituting said committee. 9206

(4) The names of the defendants or alleged co-conspirators who withdrew their agents from the City of Peoria, the date of such withdrawal, and the names of the agents of said defendants or alleged co-conspirators who were withdrawn from the City of Peoria.

(5) Names and addresses of consumers induced by the defendants not to purchase powder of the plaintiff.

9207

(6) Names and addresses of customers of the plaintiff induced by the defendants or alleged co-conspirators or any of them to abandon the purchase of powder from the plaintiff.

(7) Names and addresses of the creditors of plaintiff among whom the defendants or alleged co-conspirators or any of them circulated false and malicious rumors regarding the solvency of the plaintiff.

(8) Names and addresses of the parties among

9208 whom the defendants or alleged co-conspirators or any of them circulated false and malicious statements regarding the quality of powder manufactured by the plaintiff.

(9) The names and addresses of the miners and operators between whom the defendants or alleged co-conspirators or any of them stirred up strife to induce said miners to refuse to use the powder manufactured by the plaintiff.

9209 (10) The names and addresses of the miners who refused through any acts of the defendants or alleged co-conspirators, or any of them, to use the powder manufactured by the plaintiff.

(11) The names of the emissaries and spies sent by the defendants or alleged co-conspirators, or any of them, into the mills and plant of the plaintiff to learn the secrets of its business and to tamper with the processes of the plaintiff.

(12) What processes of the plaintiff were tampered with by any emissary and spy of the defendants or their alleged co-conspirators or any of them.

9210 (13) The names and addresses of the agents of transportation companies and the names of the transportation companies engaged (or that they tried to engage) by the defendants, the alleged co-conspirators, or any of them, to furnish information of the consignments of powder from the mills of the plaintiff, and the names and addresses of the consignees of the plaintiff.

(14) The names and addsesses of the consignees induced by the defendants, the alleged co-conspirators, or any of them, to reject the plain-

tiff's consignments of powder by offering to furnish said consignees black blasting powder below the price contracted with the plaintiff, and below any price which plaintiff might see fit to offer, and below the actual cost of said powder, as set forth in the concluding lines of section eight of the amended declaration.

(15) The names and addresses of the evilly-disposed persons employed by the defendants, the alleged co-conspirators, or any of them, to enter the mines of operators who had made purchases of 9212
black blasting powder of the plaintiff for the purpose of stirring up discontentment among the miners and of instilling into the minds of said miners prejudice against said powder and to cause them to refuse the same for the purpose of inducing the purchaser to reject said powder.

(16) The names and addresses of the operators whose mines were entered by said evilly-disposed persons.

(17) Name of the boycotts by miners against the powder manufactured by the plaintiff which the 9213
defendants or their alleged co-conspirators, or any of them, succeeded in producing, and the places at which the said boycotts occurred.

(18) The dates, names and addresses of consignees rejecting and returning consignments of powder from plaintiff's mills.

(19) The names and addresses of the persons employed by the defendant, the E. I. du Pont de Nemours Powder Company, to travel from place to place and mingle with the miners of various coal

mines to induce them to reject the powder manufactured by the plaintiff.

(20) The names and location of the mines visited by the persons referred to in the last preceding paragraph.

(21) The names and addresses of the influential miners employed by the defendant, E. I. du Pont de Nemours Powder Company, or any other of the defendants or alleged co-conspirators, to induce their fellow-workmen to boycott the powder
9215 manufactured by the plaintiff.

(22) The names of the mines where intoxicating liquors, clothing and household articles were distributed and cash paid to miners by the defendant, E. I. du Pont de Nemours Powder Company, to obtain their co-operation and influence in the boycotting of the powder manufactured by the plaintiff.

(23) Names and addresses of those to whom intoxicating liquors, clothing and household articles were distributed or cash paid by the defend-
9216 ant, E. I. du Pont de Nemours Powder Company, to obtain their co-operation an influence to boycott the powder manufactured by the plaintiff.

(24) The names and addresses of the operators who yielded to the demands of their employees and refused to make further purchases of the powder manufactured by the plaintiff.

(25) Names and addresse of the various persons the defendant, E. I. du Pont de Nemours Powder Company, caused to seek employment with the plaintiff for the purposes alleged in the tenth sec-

tion of the plaintiff's amended declaration, other than the one mentioned in said section.

(26) The names and addresses of the employees whose services were enlisted by the defendant, E. I. du Pont de Nemours Powder Company, to furnish reports of the plaintiff's shipments of powder from its mills as alleged in section ten of the amended declaration.

(27) The names and addresses of the customers of the plaintiff referred to in Section Ten who were 9218
induced to reject shipments of plaintiff's powder and to abandon the purchase of powder from the plaintiff.

(28) Names of the customers of the defendant, E. I. du Pont de Nemours Powder Company, referred to in Section Eleven, with whom secret contracts were made for said customers' exclusive trade for a term of from one to five years.

(29) Names and addresses of customers who entered into contracts with the defendant, E. I. du Pont de Nemours Powder Company, through threats to deprive said consumers of the right to 9219
purchase other grades of powder and explosives not manufactured by the plaintiff.

(30) Names and addresses of consumers who entered into contracts with said defendant, E. I. du Pont de Nemours Powder Company, through misrepresentation by the said defendant of the capacity of the plaintiff's mill and plant.

(31) Names and addresses of consumers entering into contracts with the defendant, E. I. du Pont de Nemours Powder Company, by reason of defend-

9220 ant's circulating false and damaging statements through its agents concerning accidents at the mills of the plaintiff.

(32) Names and addresses of consumers with whom the defendant, E. I. du Pont de Nemours Powder Company, secured contracts through false and malicious statements concerning the quality of the powder manufactured by the plaintiff.

9221 (33) Names and addresses of consumers with whom the said defendant, E. I. du Pont de Nemours Powder Company, obtained contracts through offers of financial assistance to said consumers.

(34) Names and addresses of customers receiving from the defendant, E. I. du Pont de Nemours Powder Company, the secret rebates based upon the schedule set forth in the Eleventh Section of the plaintiff's amended declaration on pages 22 and 23.

9222 (35) Names and addresses of the customers of the defendant, E. I. du Pont de Nemours Powder Company, receiving a "special cut price."

(36) Names and addresses of the customers of the defendant, E. I. du Pont de Nemours Powder Company, receiving increased secret rebates.

(37) Names of the agents of the defendant, E. I. du Pont de Nemours Powder Company, who caused to be printed and distributed exaggerated reports of the extent of the damage from an explosion at plaintiff's mill.

(38) Names and addresses of the customers of

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the plaintiff, among whom said exaggerated reports of said explosion were circulated.

(39) Names and addresses of the manufacturers of powder making machinery with whom the defendant, E. I. du Pont de Nemours Powder Company, conspired for the exclusive use and control of powder making machinery as alleged in the fourteenth section of said amended declaration.

(40) Names and addresses of manufacturers of powder making machinery, other than those set forth in Section Fourteen of the amended declaration, who declined to supply thep laintiff with machinery at the behest of the defendant, E.. I. du Pont de Nemours Powder Company.

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(41) Names and addresses of the persons or corporations wrom whom the plaintiff purchased its powder making machinery.

(42) The names and addresses of the manufacturers and vendors of powder, referred to in the fifteenth paragraph of the amended declaration, against whom the defendants, the alleged co-conspirators, or any of them, improperly operated.

9225

Respectfully fours,

E. I. du Pont de Nemours Powder Company,
Eastern Dynamite Company,
International Smokeless Powder and Chemical Company,
By FRANK S. KATZENBACH,
Attorney.

Plaintiff's Exhibit 3.

9226

(Apr. 6/1914, E. W. M.)

What Buckeye customers appearing on the Brewster list were taken over by the defendant, if any, after the 95-cent rate was issued.

ANSWER.

Plaintiff's Exhibit 1437 (so-called Brewster Report, made about May 1st, 1905), shows the following names to whom the du Pont company subsequently authorized a price of 95 cents.

9227

1. C. G. Brechnitz.
2. Willia C. & Mng. Co.
3. Donk Bros. C. & C. Co.
4. Marrissa Coal & Mng. Co.
5. T. M. Meek Coal Co.
6. New York Coal Co.
7. Globe Iron Co.
8. Nelsonville Sewer Pipe Co.
9. Black Diamond Coal Co.
10. C. F. Keeler Coal Co.
11. Cloverland Coal & Mng. Co.
12. Indiana Bit. Coal Co.
13. Dering Coal Co.

9228

14. Capital Coal Co.
15. Hart and Page.

Each of these cases is treated from the record separately according to the attached notes.

Note: There appears to be no customer of the Buckeye Company taken by the du Pont Company by virtue of the 95 cent price, as shown by the attached statements taken from the evidence in this case.

1. C. G. BRECHNITZ.

R. S. Waddell testified on page 2098 that his prices to Brechnitz ranged from $1.15 to 92 cents.

9229

The last sale to Brechnitz by the Buckeye Powder Co. was on Oct. 4th, 1905, of 800 kegs at 92 cents.

The 95 cents authorization to Brechnitz by the du Pont Company was April 11th, 1906, over six month after the last sale by the Buckeye Powder Company.

Mr. Brechnitz testified in this case (page 2679 *et seq.*):

On pages 2695 & 2696 Mr. Brechnitz stated that he could not get powder in time to serve his customers from the Buckeye Powder Company and 9230
was compelled to buy powder elsewhere. He said: After I found out I needed powder and couldn't get it at the proper time from the Buckeye I went to the du Pont Company. He called Mr. Spicer on the telephone and offered to pay 1.05 per keg for Powder and Mr. Spicer sold him some at this price.

Note: There has been considerable discussion throughout the case regarding the matter of the sales by the du Pont Company to Brechnitz.

2. WILLIS COAL & MNG. CO.

Authorization du Pont 95 cents May 5, 1905. 9231

At this time Buckeye was selling and continued to sell in large quantities, for example.

1625 kegs in May; 800 kegs in June; 800 kegs in July; 2400 kegs in Aug.; 1300 kegs in Oct.; 800 kegs in Nov.; 800 kegs in Jan., 1906; 1600 kegs in Feb., 1906; 800 kegs in April, 1906.

All at 1.00 per keg and until company went out of business.

3. DONK BROS. COAL & COKE CO.

95 cent authorization was made June 13, 1905.

Buckeye sold in July, '05, at 1.00; Aug., '05, at 1.00; Feb., '06, at 1.05.

9232 *Plaintiff's Exhibit 3*

Donk's testimony p. 8417 shows change to Egyptian.

4. MARISSA COAL & MINING CO.

While this concern appears upon the Brewster report as a customer of the Buckeye Powder Company, the books of the Buckeye Powder Company show that no sales were made by the Buckeye Powder Company to the Marissa Coal and Mining Company (see summaries of Buckeye Company
9233 sales from Nov. 1st, 1903, to Sept. 18, '05, Exhibit Number 1395, and Buckeye Sales from September 19, 1905, to September, 1908, Exhibit Number 1396).

While the Marissa Coal and Mining Company appears upon the defendants' answer to the bill of particulars as a customer of the Buckeye Powder Company, yet the books of the Buckeye Powder Company show that it was not a customer.

Exhibit Number 1361, known as the Coyne list of trade lost after 95 cent authorization, shows that the trade of the Marissa Coal and Mining Company was lost to the du Pont Company.

9234 5. T. M. MEEK COAL CO.

The du Pont Company made a 95 cent authorization to the T. M. Meek Coal Co. on May 31, 1905. Mr. Coyne's list (Exhibit 1359, showing trade that 95 cent authorization did not bring to the du Pont Company) contains the name of the T. M. Meek Coal Co., showing that the 95 cent authorization did not bring the trade of this company to the du Pont Company.

The books of the Buckeye Powder Company show a sale to the Meek Coal Co. under date of July 7,

1905, of 100 kegs at 1.05 per keg delivered. This shows that the du Pont Company did not take the trade of this company.

6. NEW YORK COAL CO.

Buckeye last sale was Mar. 2, 1905.

du Pont 95 cent authorization was 6 mos. later on September 4, 1905.

Coyne's list shows trade did not come to du Pont 1359. Showing some other company had gotten it. 9236

7. GLOBE IRON CO.

Buckeye sold Oct., '04, 1.09; Nov., '04, 1.10; Dec., '04, 1.09.

No sales made after December '04, by Buckeye.

Authorization of 95 cent was not made until August 13, '06.

Coyne's list shows trade retained.

NO. 1360.

In same month price of 95 cents was quoted, Buckeye was selling below price. For example Springfield Collieries Co. at 92 cents.

8. NELSONVILLE SEWER PIPE CO. 9237

Buckeye last sale was Feb. 28, 1905, at 1.05.

du Pont authorization not until Oct. 11, 1905.

Trade had passed from Buckeye 8 months before quotation was made.

9. BLACK DIAMOND COAL CO.

Last sale of Buckeye July 7, 1905. 95 cent quotation made July 2, 1906, by du Pont. Buckeye at date of July 2, 1906, was selling at 95 cents delivered, for example, Joseph Turigliatto under date of March 7, 1906 (sales book 268).

Mr. Coyne's list shows that trade was retained

9238

Ex. 1360. No evidence that trade was taken from Buckeye at a cut price.

George W. Solomon, page 8163-8166.

Some of it was returned on account of not being right grade.

The miners refused to use it.

10. CHARLES F. KEELER COAL CO.

du Pont 95 cent authorization was July 20, 1905.

Buckeye sold Oct. 12, 1905, at 1.00 delivered.

9239 Coyne's list shows trade did not come to du Pont (No. 1359).

Keeler's testimony (p. 2375) shows no cut by du Pont.

11. CLOVERLAND COAL AND MINING COMPANY, CLOVERLAND IND.

The books of the Buckeye Powder Company show two sales to the Cloverland Coal and Mining Company, as follows:

Nov. 28, 1903, 400 kegs, at 1.17 delivered; March 5, 1904, 800 kegs, at 1.16 delivered.

9240 The du Pont company made an authorization of 95 cents to the Cloverland Coal and Mining Company on May 18, 1905. This was fourteen months after the last sale of the Buckeye Powder Company to the Cloverland Coal and Mining Company.

Exhibit 1361 (showing list of trade lost after 95 cent authorization) shows that the du Pont Company lost the trade of the Cloverland Coal and Mining Company.

Note: The location of the Cloverland Coal and Mining Company as shown on the books of the Buckeye Powder Company was Terre Haute, In-

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diana. This was in the immediate vicinity of the United States Powder Company's new plant and probably that company obtained the trade.

12. INDIANA BITUMINOUS COAL CO.

Authorization May 18, 1905, at 95 cents.

Buckeye last sale to Ind. Bit. was made May 9, 1905, at 1.05 delivered.

Authorization did not bring trade (1359).

Some other, probably U. S. Co. got it.

See testimony of R. S. Ternnant—p. 2494.

13. DERING COAL CO.

9242

95 cent authorization was made May 15, 1905.

Buckeye sold on Oct. 10, 1905, 1.00 delivered; Jan. 18, 1906, 1.00 delivered; March, 1906, 1.10 delivered.

du Pont lost trade on Coyne's list.

Testimony of Waddell shows—p. 4051.

Admits that Equitable got some of trade.

As du Pont lost trade other companies must have gotten it.

14. CAPITAL COAL CO.

95 cent authorization on July 18, 1906.

Buckeye had not sold since Feb. 16, 1905, when Buckeye books show sale of 50 kegs of which 39 were returned. 9243

Deposition—See Book 51—page 8159.

Coyne's list (Ex. 1360) shows trade retained.

Page 8160. Would not shoot coal.

15. HART AND PAGE.

Authorization was Feb. 2, 1906.

Coyne's list shows that trade was retained at this price.

Buckeye sold before authorization and also after authorization.

Shows trade was divided.

Opinion of the Court.

9244 The Court: This matter has received considerable of my attention before the argument begun. I had to consider it when the application was made to me for the rule to show cause and I am prepared to dispose of the matter now.

Naturally, the first question to inquire in a matter of this kind is whether there were any papers that got to the jury improperly. Secondly, whether they got there by design of any of the parties or their counsel, and the reason for that is because the rule to be applied is different.

9245 It is against the policy of the law to permit anyone who is guilty of a wilful wrongdoing to appropriate the benefit of that misconduct, so that if a document has been designedly put in the Jury's hands, which had no business there, the question whether it had any influence upon the Juror's verdict is of no moment; the verdict will be set aside as a matter of punishment to the guilty party, and the reasons for that are so obvious it is not necessary to dwell upon them.

In this case there is no evidence at all that would warrant even the suggestion that any of the counsel in this case were guilty of deliberately putting

9246 in the hands of the Jury documents that were not admitted in evidence. There may have been a misunderstanding as to what should have gone to the Jury, but that would not be design. It would not be a deliberate purpose to place in the hands of the Jury that which should not go there.

Design of wilful misconduct being out of the way, the next question is, what is the rule to be applied where the papers have gone to the Jury inadvertently,—the element of misconduct being eliminated, misconduct in the sense of wrongdoing?

In this case design being eliminated, the question is controlled, in my judgment, by two grounds,

which do not require an examination into the kind and character of documents to determine whether they were harmful or harmless. They do not even require a consideration of the question whether the Court has power to ascertain whether the Jury, as a fact, ever considered the challenged document, but before I state those grounds I think an observation might properly be made as to the character of the documents that it is said went to the Jury improperly.

We have first the Fay Exhibits, and second, the correspondence between Mr. Waddell and some of 9248
his superiors. Third, the Demand for a Bill of Particulars, and fourth, the document which was made by Mr. Katzenbach bearing upon the 95c. rate, and its relationship to certain customers. Now, it can't be as matter of law that because some things have gone to the Jury without design, therefore, the verdict should be set aside. There are certain presumptions that arise under certain conditions, and these may be conclusive or not, depending upon circumstances.

Where a cause has been tried and the Jury have reached a verdict, that should settle the facts unless something has intervened of such startling or con- 9249
trolling character, which presumptively has caused injustice.

Rights having been established by a Jury are not to be overturned without very good cause, and it seems to me, therefore, that where the cause assigned is attributed to inadvertence we should endeavor to ascertain whether the challenged document could have had any influence upon the verdict. If such document made for the verdict and it should not have been introduced a presumption arises that without it the verdict would not have been rendered. This however is not necessarily conclusive, but unless overcome it will control, and

9250 the verdict will be set aside; but if the paper itself is harmless or of a character not supporting the verdict it would be absurd to hold that the verdict should be set aside simply because that paper got before the Jury. It seems to me that the demand for a Bill of Particulars comes within that class. I don't see how anyone can say that because a demand was made upon the pleader to either amplify his pleading or to limit it in its scope, or to make it more precise that its admission should raise a presumption that it was harmful. In some juris-
9251 dictions, and if I am not mistaken in our own State, a demand is not considered a part of the pleading. It is pretty hard to understand how that originated, because a Bill of Particulars in causes of this character, limits the pleading. It is not like a demand which, under the rules of practices, has for its purpose the eliciting of evidence, as the filing of interrogatories or something of that character, but it is intended to give the adverse party a more concise statement, or a more comprehensive or intelligent statement of what the pleader has set out in his pleadings, and so, in this case, this demand for a Bill of Particulars was limited to the declara-
9252 tion and it spent itself with reference to the declaration. Now, it is not improper to submit the declaration to the Jury, and I fail to see how its submission can be held harmful. I felt it my duty, throughout my charge, because of the very lenghtiness of the declaration and the number of things that were being asserted there, to constantly call attention to the Jury that this was allegation, and not proof. So, I can't see how, on any thoery, certainly not on anything that would lead to practical results, it could be said that the Demand for a Bill of Particulars was harmful. It is contrary to my conception of duty in exercising a sound discretion in an attempt to disturb the verdict, to say

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that as a matter of law the introduction of such demand is a ground for the setting aside of the verdict.

Now, the Fay Exhibits,—they were excluded. The Lent Exhibits were admitted. A long and strenuous struggle was made by the Plaintiff in the case to introduce the Fay Exhibits. Over and over again they popped up, the Plaintiff thinking that since the last ruling other conditions had been presented which might persuade the Court to allow them to go in. The attitude of the Plaintiff with reference to the Fay Exhibits was one that indicated that he considered them of vital importance to his contention, that they would make strongly for the determining of the contention in his behalf. Now, can it be said, that because such evidence as that was improperly, using the word "improperly" in the sense of inadvertence, permitted to go to the Jury and the verdict of the Jury was against the Plaintiff, that that should be considered harmful? It isn't an academic question, it is a practical question. It seemed to have been a very important part of the Plaintiff's contention. It related, like the Lent Exhibits, and some other evidence, to matters pertaining to the Association, its operation. its membership, the binding force of the Trade Association rules, and its practices upon the Defendant. As I understood it, it was intended to carry down those practices and to bind the Defendant at a later period than that which was fixed by the Lent Exhibits. The purpose of that was to establish an attempt to monopolize on the part of the Defendant. The Court charged in its instructions to the Jury that the fruits of the Association were carried home to the Defendant, and that they were of that character as to make them guilty of an attempt to monopolize. Now, as the Fay Exhibits made for the

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9256 Plaintiff's contention in that behalf their admission could not be harmful to it. They might have been harmful to the Defendant unless it was bound by their introduction, if the verdict had been for the Plaintiff, but they were not harmful to the Plaintiff in view of the verdict reached. The Fay Exhibits can not be treated as harmful.

Now, when you come to the letters, it looks very much as if those letters were in evidence, although only marked for identification. I must say that the record which was read by Mr. McCarter indicates
9257 that so far as these papers are within the class that was then being dealt with, and made the basis of a long colloquy between counsel and the Court, that they were in evidence.

Mr. Abbott: If your Honor will permit me right there, I neglected to refer to that, the papers themselves show that they were introduced by the defendants, they are defendants' exhibits, not ours.

The Court: I don't say what source they come from, I simply say that if they are part of the letters then being offered they must be considered as in evidence, but aside from that question, if they were not in evidence, then thy, as well as the Kat-
9258 zenbach document, are to be treated as in a class by themselves.

Now, the Katzenbach document is beyond question a paper that should not have gone to the Jury, and if Mr. Abbott's contention is right, the Waddell letters should not have gone to the Jury. Neither are within the class of the Fay Exhibits, and they do not belong to the class that the Demand for the Bill of Particulars belongs to. The Court is compelled to presume that they were read and considered by the Jury because the Courts will presume that the Jurors will perform their duties in an intelligent and conscientious manner, and,

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therefore, that all the evidence was considered by them. There has been nothing shown that those letters and the Katzenbach document were harmful, but so far as the Katzenbach document is concerned, it is of a character that may or may not have been influential in reaching the verdict and the Court will not speculate as to the direction or the extent they were influential. Mr. Abbott, when referring to the letters, said that they were of the same purport and effect as a hundred or more of others written by Mr. Waddell, and yet I am asked to hold that these additional letters would have had

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such a controlling effect upon the Jurors' minds or at least upon some of them, that the present verdict would not have been reached save for the presence of these added letters. Now, that is a little bit too much for me. As I said to counsel during his argument, of course, we could see if there was but one document or but one witness testifying to a given subject that that wouldn't have the same effect as a large number of witnesses testifying similarly, or a large number of similar documents. But we cannot apply that doctrine to a case where a fact has already been established by one hundred witnesses and say that because another hundred witnesses

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testify to the same fact, that therefore the conclusion was reached by the Jury only because of the additional hundred witnesses. The same rule applies where you have one hundred documents tending to establish one state of mind and another one hundred documents tending to the same condition or state of mind. So that there is a distinction to be made even between those letters and the Katzenbach document, but as I said at the outset, and I have only disgressed to voice my assent to much of what Defendants' counsel have said as to the effect of the admission of some of such documents, and I

come back now to the two grounds which in my judgment are absolutely controlling in this matter, they eliminate the necessity of determining whether any of these documents are of that character as to prevent the Court from endeavoring to ascertain whether they had any weight and what weight, upon the Jury's finding. They also eliminate the question of determining whether there was an agreement between the Plaintiff's counsel and those of the Defendant that these documents should go in.

9263 Those two grounds are first, that the Court, after the Jury had retired, placed the duty upon counsel to see that no documents and no writtten evidence went into the Jury room except those which were admitted in the case. Now, counsel are officers of the Court. In the stress of the conduct of a trial and while under the control of the spirit of advocacy, counsel sometimes lose sight of that fact entirely, and judges readily understand how counsel are often lead to forget that relationship. As I recall during the trial I called attention to the fact that they were first and above all officers of the Court, and secondly and subordinately, ad-

9264 vocates of a client's interests, so that when the Court laid upon counsel the duty of seeing that no exhibits, identifications now being called exhibits, should go to the Jury room unless they had been admitted, that duty was placed upon all counsel to see that was done. That duty was placed upon counsel, as I recall it, after I had referred to the Rice Exhibit and to the other exhibits found in the green books, and after Mr. Chevrier stepped up and called my attention to the need of making such an admonition. I was led myself to make the other two suggestions, because in my consideration of the testimony in preparing the charge, I had be-

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fore me a copy of the Rice Exhibit. I had no copy of the other exhibits which were contained in the green books, and which I had admitted. On the copy of the Rice Exhibits which I had, I had put a number of memoranda, and as I recall it now, some red memoranda had been made on it before I got it. I got it as a matter of convenience instead of being compelled to turn over the leaves of the green books. At the conclusion of the charge realizing the wisdom of having the exhibits that were contained in the printed books placed in some shape before the Jury, without actually sending in the books to them, I asked whether a copy had been made of the exhibits in the green books, and the statement was made that a copy of the Rice Exhibit had been made but the others were too lengthy and none had been made, and that the time was not sufficient now to make a copy. Then I asked whether they could not be torn out of the books (the first suggestion came from me in that regard), and some objection was made to mutilating the books and there was some little discussion before I went off the bench as to how those pages of the green books could be utilized without disclosing to the Jury the remainder of the books, and it was suggested by somebody, whom I am not clear now, whether the other pages could not be sealed or pasted, and I said yes, and I remember I said to be careful to paste over the first page and the last page and the last page if the first and last pages didn't relate to the Rice Exhibit, and then it was that Mr. Chevrier came up, as I remember it, with some trepidation, stating that it was impossible for him to tell what had been admitted and what had not, and then I recall making the statement, "Yes, counsel will have to ascertain from this mass of exhibits, identifications, what were admitted and should go to the Jury." Now, with that duty placed upon

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9268 counsel the Court left, went and attended to other matters. It was not objected by any of the counsel that that was a duty that ought not be placed on counsel, that it was too burdensome to be performed by them, and no objection was interposed to the placing of that duty upon counsel. It was said by Mr. Abbott that he doubted whether they could agree and I have a faint recollection, somewhat stirred up by what has been said to-day, that Mr. Abbott said that his experience during the trial led him to the conviction that they couldn't agree, and
9269 I made the remark, "very well, gentlemen, if you can't agree, I will be at my chambers and may be called upon if you can't agree as to what are properly exhibits to go to the Jury." Now, I say this, that in the presence of that charge to the counsel, and no objection being made and the only suggestion being made of the possibility or probability that you wouldn't be able to agree, the Court had a right to assume that that duty would be performed. Now, it wasn't performed. Shall the party who didn't perform it now make that a ground for setting aside the verdict? Understand, I am not suggesting, because it is foreign to my mind,
9270 that that duty was not performed purposely. I haven't any such thought in mind. I think it is very likely that from what transpired and over which there is no conflict, that counsel thought they could, in spirit, comply with that order, for that is what it was, without actually covering every piece of paper that bore an identification mark. Counsel for the Plaintiff seemed to think that if he looked after his own exhibits that that was all he was required to do, and if the Defendants looked after their exhibits, why, then both sides would have performed their duty as they understood it. That would not be a performance, however. That

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would almost be an idle performance, because while the Plaintiff may be satisfied that a certain line of exhibits should go in, unless the Defendants did so there would not be an agreement, and in that way evidence could go into the Jury room which should never have gone in, and also if the Defendant should do that on his own volition. That duty required the counsel to get together. The matter of what should go to the Jury was a matter for counsel, but that duty could not be performed unless counsel looked over each others selection of exhibits which they thought ought to go to the Jury. If that had been done, none of those papers would have gone to the Jury. It wasn't done. Inadvertently that duty wasn't performed,—surely not designedly.

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Now, that being the case, that puts the situation on a basis different from any that is referred to in any of the cases that counsel have referred to. If the case was as in Hughes against Warburgh, I should be constrained to follow that case. If it was within the other cases of this judicial district, I should be constrained to follow them, but this case stands in that particular as unique as it has stood in many other features, and no case has been cited, and perhaps none will be found where this specific duty was pointedly and emphatically placed by the Court upon counsel.

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Now, there was a reason for it in this case. This case is unique in the fact, not only that it took a long time to try, but because of the large number of documents that were identified, the large number that were admitted and the large number that were excluded, and the relationship of all the admitted documents to the oral testimony. Difficult indeed would it be for the Court not to say anything about the Clerk, to attempt to go through the large mass of documentary exhibits, as there was in this case, and not make a mistake as to what

9274 should go to the Jury and what should not. Many of the documents admitted were simply identified and not marked again as admissions in the case. And therefore it was a case peculiarly requiring just that kind of an order of the Court, and counsel were neglectful in the matter and because of that neglect, we are now confronted with this unfortunate situation. The duty of the Court is plain. The general policy in the administration of justice must control, not the specific upon any given case. Can it be that it is within the power of counsel either
9275 to maintain or set aside a verdict? Unscrupulous counsel would have an excellent opportunity for speculating upon the results by not performing such a duty when cast upon him. There are no such counsel in this case, I am thankful to say, and when I refer to unscrupulous counsel, I do it merely to show you the danger of permitting such a thing to interfere in the administration of justice. Shall neglectful counsel be clothed with such power? Shall it lie in the mouth of neglectful counsel to say afterwards, because he didn't perform this duty that was required of him, that he has the right to make that the ground for the setting aside of his
9276 verdict? Now, that is just what it means. It can't be that in our system of jurisprudence the product of ages of endeavor to ascertain the best way of finding the facts and to safeguard the conclusion of the Jury, that a verdict may be set aside because counsel had not performed their full duty. It is not always easy for the Court to determine whether a counsel did a thing designedly or inadvertently, but as far as this cause is concerned it doesn't make any difference. The fact that it wasn't done controls. The Court is not required to examine whether it was done with a view of speculation and as throwing an anchor to windward if the verdict didn't go

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as expected. Neither counsel in the case will be permitted to make their neglect to segregate the documents a ground for a motion for a new trial. On that ground alone the rule to show cause must be discharged, but the second one I have in mind is that the error here, to the extent that it was an error, was learned by counsel before the verdict was rendered. In that respect the case stands differently from any of those cited, namely that the error was discovered before the rendition of the verdict. Counsel learned it while the Jury was yet deliberating and promptly and properly called it 9278
to the attention of the Court. There was opportunity therefore,—the verdict not yet having been rendered,—to do one of two things. First, after ascertaining that such documents had been improperly admitted to the Jury room, to ask that the Jury be discharged from any further consideration of the matter; that would have placed squarely on the Court the responsibility of determining whether there was sufficient in the case to warrant that drastic course, or whether it was of such a nature that the error could be cured by proper instructions; the second one was for counsel, after having eliminated the improper documents, to ask the 9279
Court for specific instructions to the Jury, couched in such language that they would have been compelled to renew their consideration of the matter submitted them and make it a matter de novo, having their attention specifically called to the fact that there were some documents that had been inadvertently left to their consideraion, it being within the power of counsel to ask the Court to take up every one of these documents, if thought advisable, and tell the Jury pointedly, "If you have considered this paper, it must be eliminated." The Court could have been required to do as to such

9280 matter as is frequently required during the proceeding of a trial or at the end, to rule out some questions or a particular document in the case. If either of these courses had been pursued the Court would have had the responsibility placed upon it, and upon the action of the Court error could have been assigned.

Now, as I say, counsel called attention to the Court and the Court immediately after summoning the counsel on the other side ordered the bailiff to bring in the papers. Upon a question being asked
9281 by someone the Court said, "It is not necessary to bring in the books." That placed upon the bailiff the duty, and the statements were made in the presence of counsel, to bring everything else in. He brought in a number of packages of papers. The question now raised I presume, although not very strenuously, is that some may have been left out in the Jury room. It is possible. It is not, perhaps, a matter that has been as I recall it specifically referred to.

Mr. Abbott: There is testimony upon that.

The Court: I mean in the argument. Yes, I think that is where I got the idea. Very well, now,
9282 the papers were brought in and counsel were given the opportunity to examine them and counsel did examine them and segregated them and a number of documents were withdrawn and the rest were returned to the Jury. Now, if the Demand for the Bill Particulars and the Katzenbach document were not brought back from the Jury room when counsel examined the papers, the question there was whether counsel were not required to specifically ask, and if necessary, have the Court direct the bailiff to return to the Jury room to ascertain whether there were any other documents that had not been brought from the Jury room. With an order by the

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Court upon the bailiff to bring in all the documents except the books, the presumption must be that in the performance of that order he fully performed it, and in the absence of any objection, or any suggestion that possibly there were other documents, there being such a large number in the case, the Court would be justified in the presumption that the Demand for the Bill of Particulars and the Katzenbach document were among those which counsel examined, and if they were, then if they were returned to the Jury room they were returned through the inadvertence of the examining coun- 9284
sel. If they were not there but were without, in view of the fact that counsel could have ascertained to a certainty whether they were there, the fact that they were in the Jury room, furnishes no ground to set aside the verdict.

So, I say, as I view this matter upon either of these two grounds, there is no justification for a disturbance of this verdict, and the verdict must stand and the rule is discharged. Now, I will hear you.

Mr. Abbott: All I want to say is that I think what your Honor has said about the so-called Katzenbach document is something of a reflection, although 9285
your Honor may not have intended it, but the evidence shows I had no knowledge at all of that paper.

The Court: I was assuming that. You are not chargeable with knowledge that the Demand for the Bill of Particulars, and this Katzenbach document were before the Jury, for, you didn't know that the Katzenbach document was in existence, but the point I am making is that after the papers were withdrawn from the Jury for examination and you had ascertained that a number of documents had improperly gone to the Jury, that it would seem as if the natural inquiry would be in view of the

9286 *Opinion of the Court*

large number of exhibits, are there any others. Upon such an inquiry the Court would then extend a further inquiry directed to the Jury room to ascertain whether there were any others, and if there were any others and they had been brought in, these two documents would have been found in case they were not among those already withdrawn. I am absolving you from any wilful wrongdoing. I am not dealing with it as if there was such culpability, but I am dealing with it as an act of negligence, not indefensible perhaps under all the circumstances, but yet of such a character as to prevent
9287 its furnishing a basis to disturb the verdict.

Mr. Abbott: I would like to take an exception, if your Honor please, to your ruling.

Exception allowed.

Mr. Abbott: May I have these papers put under seal again?

The Court: Yes.

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY.

Present: HON. JOHN RELLSTAB, *Judge*.

9288

BUCKEYE POWDER COMPANY,
vs.
E. I. DU PONT DE NEMOURS POWDER CO., *et al.*

Minutes of the Court of April 10, 1914.

Argument on Return of Rule to Show Cause why new trial should not be granted. Linton Satterthwaite, Esq., and Twyman O. Abbott, Esq., heard for the motion. Robert H. McCarter, Esq., opposed. Twyman O. Abbott, Esq., closed.

Motion denied. Rule discharged.

Certificate to Bill of Exceptions. 9289

And forasmuch as the facts aforesaid set forth on pages 24 to 3096, inclusive, do not appear fully of record, the plaintiff prays that this, its Bill of Exceptions, may be allowed.

So ordered, this day of , 1914.

....., Judge.

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9292 **Order Extending Time for Filing Bill of Exceptions. Entered April 6, 1914.**

This cause having come on to be heard this day before the Honorable John Rellstab, Judge of the above-entitled Court, upon the application of plaintiff, by its counsel, Twyman O. Abbott, for an extension of the time for settling the bill of exceptions herein, it is hereby

ORDERED that the time for settling the Bill of Exceptions be, and the same hereby is, extended until
9293 the 16th day of April, 1914.

JOHN RELLSTAB, Judge.

Order Extending Time for Filing Bill of Exceptions. Entered April 16, 1914.

This cause having come on to be heard this day before the Honorable John Rellstab, Judge of the above-entitled Court, upon the application of plaintiff, by its counsel, Twyman O. Abbott, for an ex-
9294 tension of the time for settling the bill of exceptions herein, it is hereby

ORDERED that the time for settling the Bill of Exceptions be, and the same hereby is, extended until the 16th day of May, 1914.

JOHN RELLSTAB, Judge.

Order Extending Time for Filing Bill of Exceptions. Entered May 14, 1914. 9295

This cause having come on to be heard this day before the Honorable John Rellstab, Judge of the above-entitled Court, upon the application of plaintiff, by its counsel, Twyman O. Abbott, for an extension of the time for settling the bill of exceptions herein, it is hereby

ORDERED that the time for settling the Bill of Exceptions be, and the same hereby is, extended until the 30th day of May, 1914. 9296

JOHN RELLSTAB, Judge.

Order Extending Time for Filing Exceptions. Entered Sept. 3, 1914.

Application having been made on behalf of the plaintiff for an order extending the time for filing the bill of exceptions in the above stated cause;

It is, on this third day of September, nineteen hundred and fourteen, on motion of McFarland, Taylor & Costello, of counsel for the plaintiff, ordered that the time for filing the bill of exceptions in said cause be extended to the twenty-eighth day of September, nineteen hundred and fourteen. 9297

JOHN RELLSTAB, Judge.

9298 **Order Extending Time for Filing Exceptions. Entered Sept. 3, 1914.**

Application having been made on behalf of the plaintiff for an order extending the time for filing the bill of exceptions in the above stated cause;

It is, on this 3rd day of September, nineteen hundred and fourteen, on motion of McFarland, Taylor & Costello, of counsel for the plaintiff, ordered that the time for filing the bill of exceptions in said cause be extended to the twenty-eighth day of September, nineteen hundred and fourteen.

JOHN RELLSTAB, Judge.

Filed September 3, 1914.

9299 **Notice of Settlement of Bill of Exceptions, Filed Sept. 17, 1914.**

(Title of Court and Cause.)

To the above named defendants and to Frank S. Katzenbach, Jr., Robert H. McCarter, J. P. Laffey, William H. Button and George S. Graham:

PLEASE TAKE NOTICE that the plaintiff in the above entitled cause will apply to the Hon. John Rellstab, Judge of the above entitled court, on the 28th day of September, 1914, at his Chambers in Trenton, N. J., at the hour of 10:30 o'clock of said
9300 day or as soon thereafter as the matter may be heard, to sign the bill of exceptions in said cause; and a copy of said bill of exceptions as the same will be presented to said Judge at said time for his signature is herewith served upon you.

MACFARLAND, TAYLOR & COSTELLO,
WILLARD U. TAYLOR,
TWYMAN O. ABBOTT,
Attorneys for Plaintiff,
63 Wall Street,
Borough of Manhattan,
City of New York.

Filed Sept. 17, 1914.

Order Extending Time for Filing Exceptions. Entered Sept. 28, 1914. 9301

Application having been made on behalf of the plaintiff for an order extending the time for filing the bill of exceptions in the above stated cause;

It is, on this 28th day of September, nineteen hundred and fourteen, on motion of MacFarland, Taylor & Costello, of counsel for the plaintiff, Ordered that the time for filing the bill of exceptions in said cause be extended to the 17th day of October, nineteen hundred and fourteen.

JOHN RELLSTAB, 9302
Judge.

Filed Sept. 28, 1914.

9303

9304 DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

THE BUCKEYE POWDER COMPANY, *a Corporation*, Plaintiff,

against

E. I. DU PONT DE NEMOURS POWDER COMPANY (a Corporation of New Jersey), EASTERN DYNAMITE COMPANY (a Corporation of New Jersey), INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY (a Corporation of New Jersey, Defendants.

Assignment of Errors.

9305

Now, on this 5th day of October, 1914, comes the plaintiff, by MacFarland, Taylor & Costello, Willard U. Taylor, Twyman O. Abbott and Walter J. Bartnett, its attorneys, and says that the judgment entered in this case on the 20th day of April, 1914, is erroneous and against plaintiff's just rights, and that in the proceedings in the above entitled case, error was committed as follows, to wit:

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1. In instructing the jury as follows:

"The suit is brought by the Buckeye Powder Company and has proceeded to trial against three defendants. The evidence, however, fails to support any participation by the Eastern Dynamite Company and the International Smokeless Powder

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and Chemical Company, and my instructions to you are that you return a verdict of no cause of action in their favor."

3. In making an order requiring the plaintiff to make an election to rely solely upon the proof of acts declared to be unlawful by Sec. 1 of the Act of Congress of July 2, 1890, commonly known as the Sherman Act, or to rely solely upon acts declared to be unlawful by Sec. 2 of said act.

4. In instructing the jury as follows:

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"The plaintiff's grievance is, that the defendant has violated the second section of the Anti-Trust Act and which, as already noted, makes the monopolizing "or attempt to monopolize" any part of the trade among the several States unlawful; and, that in consequence thereof it has been injured in both its business and its property."

5. In refusing to admit the decree of the United States District Court for the District of Delaware in the case of United States of America, Petitioner v. E. I. du Pont de Nemours & Company, *et al.*, No. 280 in equity in said court, and entered therein on the 21st day of June, 1911, which said decree is as follows:

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INTERLOCUTORY DECREE.

"This cause coming on to be heard before the three Circuit Judges of the Third Judicial Circuit in the Circuit Court of the United States for the District of Delaware, under the provisions of the expediting act of February 11, 1903, in the presence of George W. Wickersham, Attorney General of the United States; William S. Kenyon, Assistant to said Attorney General, and James Scarlet and William A. Glasgow, Jr., special assistants to said Attorney General, and Frederic Ullmann, for the

9310 defendants the American Powder Mills, the Miami Powder Company, and the Aetna Powder Company, M. B. & H. H. Johnson, for the defendant, the Austin Powder Company; Frederick Seymour, for the defendant the Equitable Powder Manufacturing Company; David T. Marvel and David T. Watson, for the defendant Henry A. du Pont, Burton B. Tuttle, for the defendant the King Powder Company, and John C. Spooner, James M. Townsend, George S. Graham, William S. Hilles, and William H. Button, for the remaining defendants, and the court having read the pleadings and proofs and heard the argument of counsel, and duly considered
9311 the same; and it appearing to the court that the petitioner, the United States of America, is entitled to the relief hereinafter mentioned:

"It is thereupon, on the 21st day fo June, A. D. 1911, ordered, adjudged and decreed, and this court, by virtue of the power and authority duly conferred on it by law, does hereby order, adjudge and decree as follows, to wit:

"1. That the petition be dismissed as to the following defendants, namely: Aetna Powder Company, Miami Powder Company, American Powder Mills, Equitable Powder Manufacturing Company, Austin Powder Company, King Powder Company, Anthony Powder Company, Limited, American E. C. & Schultze Gunpowder Company, Peyton Chemical Company, Henry A. du Pont, Henry F. Bald-
9312 win, California Powder Works, Conemaugh Powder Company, Metropolitan Powder Company, and E. I. du Pont Company of August 1, 1903.

"2. That the remaining 28 defendants, namely, Hazard Powder Company, Laflin & Rand Powder Company, Eastern Dynamite Company, Fairmont Powder Company, International Smokeless Powder & Chemical Company, Judson Dynamite & Powder Company, Delaware Securities Company, Delaware Investment Company, California Investment Company, E. I. du Pont de Nemours & Co., of Pennsylvania, du Pont International Powder Company, E. I. du Pont de Nemours Powder Company, E. I. du Pont de Nemours & Co., Thomas Coleman du Pont, Pierre S. du Pont, Alexis I. du Pont, Alfred I. du Pont, Eugene du Pont, Eugene E.

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du Pont, Henry F. du Pont, Irenne du Pont, Francis I. du Pont, Victor du Pont, Jr., Jonathan A. Haskell, Arthur J. Moxham, Hamilton M. Harksdale, Edmond G. Buckner, and Frank L. Connable, are maintaining a combination in restraint of interstate commerce in powder and other explosives in violation of section 1 of the act entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890, that they have attempted to monopolize and have monopolized a part of such commerce in violation of section 2 of that act, that they shall be enjoined from continuing said combination, and that the combination shall be dissolved.

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"3. That this Court, in order to obtain such further information as shall enable it to frame a final decree which shall give effective force to its adjudication, will hear the petitioner and the defendants on the 16th day of October next as to the nature of the injunction which shall be granted herein and as to any plan for dissolving said combination which shall be submitted by the petitioner and the defendants, or any of them, to the end that this court may ascertain and determine upon a plan or method for such dissolution which will not deprive the defendants of the opportunity to re-create, out of the elements now composing said combination, a new condition which shall be honestly in harmony with and not repugnant to the law.

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"4. That both parties have leave to take such additional proofs as they may deem proper to be used at the hearing aforesaid.

"5. That, until the entry of final decree herein, said 28 defendants hereinabove last named are, and each of them is, and the agents and servants of them are jointly and severally hereby enjoined from doing any acts or act which shall in any wise further extend or enlarge the field of operations or the power of the aforesaid combination.

(Signed) GEO. GRAY,
JOS. BUFFINGTON,
W. M. LANNING,
Circuit Judges of the Third Judicial Circuit."

9316 *Assignment of Error No. 6*

6. In refusing to admit the decree of the United States District Court for the District of Delaware in the case of United States of America, Petitioner *v.* E. I. Du Pont de Nemours & Company, *et al.*, No. 280 in equity in said court, and entered therein on the 13th day of June, 1912, which said decree is as follows:

"FINAL DECREE.

"This cause coming on to be heard for final decree in accordance with the interlocutory decree
9317 entered herein on the 21st day of June, A. D., 1911, before the three Circuit Judges of the Third Judicial Circuit, in the District Court of the United States for the District of Delaware, in the presence of George W. Wickersham, Attorney-General of the United States, and James Scarlet, William A. Glasgow, Jr., and Victor N. Roadstrum, special assistants to said Attorney-General, and Ullmann & Hoag, for the defendants, the American Powder Mills, the Miami Powder Company and the Aetna Powder Company; M. B. & H. H. Johnson, for the defendant, the Austin Powder Company; Frederick Seymour, for the defendant, the Equitable Powder Manufacturing Company; David T. Marvel and David T. Watson, for the defendant, Henry A. du
9318 Pont; Burton B. Tuttle, for the defendant, the King Powder Company, and John C. Spooner, James M. Townsend, George S. Graham, William S. Hilles, Frank S. Katzenbach, Jr., and William H. Button, for the remaining defendants, and this Court by said interlocutory decree having consented to hear the petitioner and the defendants herein as to the nature of the injunction which shall be granted herein and as to a plan for dissolving the combination found herein by said Court to exist, to the end that this Court may ascertain and determine upon a plan or method for such dissolution which will not deprive the defendants of the opportunity to recreate out of the elements now composing said combination a new condition

which shall be honestly in harmony with and not repugnant to the law, and the Court having heard argument of counsel herein and having duly considered the matter, and it appearing to the Court that the petitioner, the United States of America, is entitled to the relief hereinafter mentioned.

"It is thereupon, on this 13th day of June, A. D. 1912, ORDERED, ADJUDGED AND DECREED as follows, to wit:

1. That the petition be dismissed as to the following defendants, namely: Aetna Powder Company, Miami Powder Company, American Powder Mills, Equitable Powder Manufacturing Company, Austin Powder Company, King Powder Company, 9320
Anthony Powder Company, Limited; American E. C. & Schultze Gunpowder Company, Peyton Chemical Company, Henry A. du Pont, Henry F. Baldwin, California Powder Works, Conemaugh Powder Company, Metropolitan Powder Company, E. I. du Pont Company of August 1, 1903, and International Smokeless Powder and Chemical Company.

"2. That the remaining twenty-seven defendants, namely: Hazard Powder Company, Laflin & Rand Powder Company, Eastern Dynamite Company, Fairmont Powder Company, Judson Dynamite & Powder Company, Delaware Securities Company, Delaware Investment Company, California Investment Company, E. I. du Pont de Nemours & Company of Pennsylvania, du Pont 9321
International Powder Company, E. I. du Pont de Nemours Powder Company, E. I. du Pont de Nemours & Company, Thomas Coleman du Pont, Pierre S. du Pont, Alexis I. du Pont, Alfred I. du Pont, Eugene du Pont, Eugene E. du Pont, Henry F. du Pont, Irenne du Pont, Francis I. du Pont, Victor du Pont, Jr., Jonathan A. Haskell, Arthur J. Moxham, Hamilton M. Barksdale, Edmund G. Buckner, and Frank L. Connable, are maintaining a combination in restraint of interstate commerce in powder and other explosives in violation of Section 1 of an act entitled 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," approved July 2,

9322

1890, and have attempted to monopolize and have monopolized a part of such commerce in violation of Section 2 of said Act.

WHEREFORE, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the twenty-seven (27) defendants above mentioned, and each of them be enjoined from continuing said combination and monopoly, and that said combination and monopoly be dissolved.

"3. That the petitioner having availed itself of the permission granted in said interlocutory decree and having presented a certain plan for the dissolution of said combination and the dissolution

9323 of said monopoly, so far as the present situation of the parties and the properties involved will permit, to which said plan the said twenty-seven (27) defendants do not object, which said plan is as follows:

"FIRST. Dissolve the defendant corporation E. I. du Pont de Nemours & Company (1902 Delaware corporation)and distribute its property among its stockholders.

"SECOND. Dissolve the defendant corporation Hazard Powder Company and distribute its property among its stockholders.

"THIRD. Dissolve the defendant corporation Delaware Securities Company and distribute its property among its stockholders.

"FOURTH. Dissolve the defendant corporation

9324 Delaware Investment Company and distribute its property among its stockholders.

"FIFTH. Dissolve the defendant corporation Eastern Dynamite Company and distribute its property among its stockholders.

"SIXTH. Dissolve the defendant corporations California Investment Company and Judson Dynamite and Powder Company, and distribute their property among their stockholders.

"SEVENTH. Organize two corporations in addition to E. I. du Pont de Nemours Powder Company (1903, New Jersey Corporation), which shall be capitalized as hereinafter provided, or reorganize the Laflin & Rand Powder Company and the Eastern Dynamite Company, or either of them, to

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be used instead of one or both of said two corporations, and in case the said Eastern Dynamite Company is so selected, then it need not be dissolved as hereinafter provided. In case the Laflin & Rand Powder Company is not used under this paragraph, dissolve said Company and distribute its property among its stockholders.

To the first of said corporations transfer the following plants:

"*For the Manufacture of Dynamite:*

Plant at Kenville, New Jersey,
Plant at Marquette, Michigan,
Plant at Pinole, California.

"*For the Manufacture of Black Blasting Powder:* 9326
Plant at Rosendale, New York,
Two (2) plants at Ringtown, Pennsylvania,
Plant at Youngstown, Ohio,
Plant at Pleasant Prairie, Wisconsin,
Plant at Turck, Kansas,
Plant at Santa Cruz, California.

"*For the Manufacture of Black Sporting Powder:*
Plant at Hazardville, Connecticut,
Plant at Schaghticoke, New York.

"To the second of said corporations transfer the following plants:

"*For the Manufacture of Dynamite:*
Plant at Hopatcong, New Jersey,
Plant at Senter, Michigan,
Plant at Atlas, Missouri,
Plant at Vigorit, California. 9327

"*For the Manufacture of Black Blasting Powder:*
Plant at Riker, Pennsylvania,
Plant at Shenandoah, Pennsylvania,
Plant at Ooltewah, Tennessee,
Plant at Belleville, Illinois,
Plant at Pittsburg, Kansas.

"And permit the said defendant E. I. du Pont de Nemours Powder Company to retain the following plants:

"*For the Manufacture of Dynamite:*
Plant at Ashburn, Missouri,
Plant at Barkdale, Wisconsin,
Plant at du Pont, Washington,

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Plant at Emporium, Pennsylvania,
Plant at Hartford City, Indiana,
Plant at Louviers, Colorado,
Plant at Gibbstown, New Jersey,
Plant at Lewisburg, Alabama.

"*For the Manufacture of Black Blasting Powder:*
Plant at Augusta, Colorado,
Plant at Connable, Alabama,
Plant at Oliphant Furnace, Pennsylvania,
Plant at Mooar, Iowa,
Plant at Nemours, West Virginia,
Plant at Patterson, Oklahoma,
Plant at Wilpen, Minnesota.

"*For the Manufacture of Black Sporting Powder:*

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Plant at Brandywine, Delaware,
Plant at Wayne, New Jersey.

"*For the Manufacture of Smokeless Sporting Powder:*
Plant at Carney's Point, New Jersey,
Plant at Haskell, New Jersey.

"*For the Manufacture of Government Smokeless Powder:*
Plant at Carney's Point, New Jersey,
Plant at Haskell, New Jersey.

"EIGHTH. Transfer to or furnish the first of said two corporations with a plant for the manufacture of smokeless sporting powder and the brands now or heretofore owned by the Laflin & Rand Powder Company. Such plant to be located at Ken-

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ville, New Jersey, or some other suitable Eastern point, and to be of a capacity sufficient to manufac 950,000 pounds per annum of smokeless sporting powder of the brands to be assigned to the first of said corporations.

"NINTH. Furnish said two corporations respectively with sufficient working capital and the necessary cash and facilities to enable them to efficiently carry on the business which will attend the properties so to be transferred to them.

"TENTH. Transfer said properties to said two corporations respectively upon a valuation thereof based on the last inventory of said properties, to include a fair valuation for brands and good-will,

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and issue to said E. I. du Pont de Nemours Powder Company in payment therefor securities of said two corporations respectively at par value as follows: Fifty per cent. (50%) of said purchase price in bonds not secured by mortgage, which shall bear interest at the rate of six per cent. (6%) per annum, payable if earned by the company during said year, or to the extent thereof earned, but not otherwise not cumulative, payable not less than ten years from date; the form of said bonds to be approved by the Attorney-General or the Court, which bonds shall be subject to call at one hundred and two (102), and the other fifty per cent. (50%) of said purchase price in the stock of said two corporations respectively, which for the time being shall be their entire stock issues. Upon the receipt of said stock and bonds by E. I. du Pont de Nemours Powder Company, distribute the said stock and one-half of said bonds or the proceeds of the sale of said bonds among the stockholders of E. I. du Pont de Nemours Powder Company. In the organization or reorganization of said two corporations to which said properties are to be transferred, provide two issues of stock in said two corporations respectively, one of which shall have voting power and the other of which shall have no voting power. So distribute said stock among the stockholders of E. I. du Pont de Nemours Powder Company that any amounts thereof which upon said distribution shall go to any one of the twenty-seven defendants hereinbefore mentioned shall consist one-half of said stock with voting power and one-half of said stock without voting power, and provide that upon the transfer through death or by will from any one of said twenty-seven defendants of any stock which has no voting power, to some person or persons other than one of said twenty-seven defendants herein, or upon the sale by any one of said twenty-seven defendants of any stock which has no voting power, to some person or persons other than one of said twenty-seven defendants herein, or their respective wives or children, said stock so sold or transferred may be exchanged for stock with voting power.

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9334 *Assignment of Error No. 6*

"ELEVENTH. Transfer to said two corporations, respectively, so far as practicable, a fair proportion of the business in explosives now controlled by E. I. du Pont de Nemours Powder Company under time contracts.

"TWELFTH. During a period of at least five years furnish each of said two corporations respectively, under such arrangement as may be reasonable, such information from the records of the Trade Bureau maintained by E. I. du Pont de Nemours Powder Company as may be desired.

"THIRTEENTH. During a period of at least five years furnish to each of said two corporations such facilities, information, and use of organiza-
9335 tion, as E. I. du Pont de Nemours Powder Comppany may operate or possess in reference to purchase of materials, experimentation, development of the art and scientific research, as said two corporations may desire from time to time, in the interests of their business, and upon some reasonable terms as to the cost thereof to said two corporations.

"AND SAID PLAN having been duly considered by the Court, it is ORDERED, ADJUDGED AND DECREED that the said defendants are respectively directed to proceed forthwith to carry said plan into effect, and it is further

ORDERED, ADJUDGED AND DECREED, that if said defendants shall not have carried said plans into op-
9336 eration and effected the same on or before the 15th day of December, 1912, then and in that event an injunction shall issue out of this Court restraining the said defendants in paragraph two of this decree mentioned and each of them, and their agents and servants from thereafter in any manner whatsoever placing the products of any of the factories owned by said defendants or said combination into the channels of interstate commerce, or such other relief shall be granted by the appointment of a receiver or otherwise as this Court may determine.

"4. That should the defendants find it impossible to perfect the details of said plan on or before the said 1st day of December, 1912, they may

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have leave to apply to the Court for further time to carry out said plan.

"5. That until said plan is carried into operation and effect, the said twenty-seven defendants hereinbefore named in paragraph two of this decree, are, and each of them is, and the agents and servants of them are jointly and severally hereby enjoined from doing any acts or act which shall in any wise further extend or enlarge the field of operations, or the power of the aforesaid combination.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the said twenty-seven (27) defendants, their officers, directors, servants, agents and employees be and they are hereby severally enjoined and restrained as follows:

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From continuing or carrying into further effect after said 1st day of December, 1912, the combination adjudged illegal in this suit, and from entering into or forming among themselves or with others any like combination or conspiracy by any method or device whatsoever, the effect of which is or will be to restrain intersetate commerce in explosives or to renew the unlawful monopoly of such commerce obtained and possessed by the defendants as adjudged herein, in violation of an 'Act to protect trade and commerce against unlawful Restraints and Monopolies," approved July 2, 1890; and especially:

"1. By causing the conveyance of the factories, plants, brands or business of etheir of said two new corporations to the other corporations or to E. I. du Pont de Nemours Powder Company or *vice versa* after the segregation of the properties among said corporations shall have taken place as herein provided; by placing the stocks of either of said corporations in the hands of voting trustees or controlling the voting power of such stocks by any device;

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"2. By making any express or implied agreement or arrangement with one another or with others relative to the control or management of either of said corporations, or the price or terms of purchase, or of sale of explosives or relative to

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the purchase, sale, manufacture, or transportation of explosives which will have the effect of restraining interstate commerce; or by making any agreement or arrangement of any kind between said corporations under which trade or business is apportioned between said corporations in respect either to customers or localities.

"3. By offering or causing to be offered or making or causing to be made more favorable prices or terms of sale for the products manufactured by them or either of them to the customers of any rival manufacturer or manufacturers than they at the same time offer to make to their established

9341 trade, where the purpose is to unfairly cripple or drive out of business such rival manufacturer or manufacturers or otherwise unlawfully to restrain the trade and commerce of the United States in any of said products; provided, that no defendant is enjoined or restrained from making any price or prices in the sale of said products, or any thereof, to meet or to compete with prices made by any other defendant, or by any rival manufacturer; and provided further, that nothing in this decree shall be taken in any respect to enjoin or restrain fair, free and open competition.

"4. By either of said corporations retaining or employing the same clerical force or organization, or keeping the same office or offices as any other of said corporations.

9342 "5. By either of said corporations doing business directly or indirectly under any other than its own corporate name or the name of a subsidiary corporation controlled by it, provided, however, that in case of a subsidiary corporation, the controlling corporation shall cause the products of such subsidiary corporation which are sold in the United States and bear the name of the manufacturer to bear also a statement indicating the fact of such control.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED tht said defendants cancel and annul:

"*a*. Agreement of October 2, 1902, between William Barclaly Parsons, of the City of New York, and the Delaware Securities Company. Petitioner's Record, Exhibits, Volume 4, page 1984.

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"*b.* Agreement of October 6, 1902, between H. dell. Parsons, of the City of New York, and Delaware Securities Company. Petitioner's Record, Exhibits, Volume 4, page 1986.

"*c.* Agreement of the second day of October, 1902, between Schuyler L. Parsons, of the City of New York, and Delaware Securities Company. Petitioner's Record, Exhits, Volume 4, page 1988.

"*d.* A like and identical agreement made about the same date between J. A. Haskell and the Delaware Securities Company, described in Petitioner's Testimony, Volume 2, page 1012.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that during a period of five years from the date 9344
hereof each of said corporations, the E. I. du Pont de Nemours Powder Company and said two other corporations, their officers, directors, agents, servants and employees, be hereby enjoined and restrained as follows:

"1. None of said corporations shall have any officer or director who is also an officer or director in any other of said corporations.

"2. None of said corporations shall employ the same agent or agents for the sale in interstate commerce of explosives which might be sold in competition with each other; provided that any one of said corporations may sell its products on commission through a merchant or dealer who is similarly employed by either or both of said other corporations. 9345

"3. None of said corporations shall directly or indirectly acquire any stock in another of said corporations or purchase or acquire any of the factories, plants, brands or business of such other corporation.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each and all of the individual defendants by this decree adjudged to be engaged in said combination while holding stock in said two corporations and E. I. du Pont de Nemours Powder Company or any two thereof, be enjoined and restrained from at any time within three years from the date hereof acquiring, owning or holding, directly or indirectly, any stock of any legal or equitable in-

9346 terest in any stock in either of said two corporations to which said properties shall be transferred in excess of the amount to which he may be entitled under the provisions of the plan herein mentioned when the same shall have been carried out as proposed; provided, however, that any of said individual defendants may, notwithstanding this prohibition, acquire from any other or others of said defendants, or in case of death, from their estates, any of the stock held by such other defendant or defendants in said corporations and may acquire their proportions of any increase of stock.

9347 "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any new company or companies organized for the purpose of taking property under the provisions of this decree or otherwise, necessary to the carrying out of this plan, shall, after their formation and by appropriate proceedings, be made parties to this cause, and subject to the provisions of this decree and bound by the injunctions herein granted.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any party hereto may make application to this court for such orders and directions as may be necessary or proper in relation to the carrying out of such plant and the provisions of this decree.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the twenty-seven (27) defendants hereinabove
9348 mentioned, do pay to the United States Governmen its costs in this cause.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that jurisdictionn of this cause is retained by this court, for the purpose of making such other and further orders and decrees, if any, as may become necessary for carrying out the plan herein set forth.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that after the plan hereinabove mentioned shall have been carried into effect a report shall be made to this court for its approval, setting out the manner in which said plan shall have been carried out.

(Signed) GEORGE GRAY,
JOSEPH BUFFINGTON,
JOHN B. McPHERSON.
Circuit Judges.

Assignment of Errors Nos. 7-8

9349

7. In refusing to permit plaintiff's witness Thomas Coleman du Pont to answer the following question—said witness having already been permitted to testify that he knew that the Circuit Court of the United States had decided that the legal effect of the various steps taken by him and his associates to take over certain properties and certain companies and in the organization of the E. I. du Pont de Nemours Powder Company, was that said organization was a monopoly:

"Q. Well, but did you know what steps the court took with reference to that matter after it reached that decision?" 9350

8. In instructing the jury as follows:

"The fact that the status of the defendant was such, however, that under a direct attack by the Government it would be dissolved as an unlawful combination in restraint of trade and an attempt to monopolize, would not alone make it liable in an action for damages. Such a suit can be maintained only for injuries sustained by reason of such attempted monopolization, so that in a suit for damages the defendant is entitled to more defenses than would be available in a suit brought by the Government for dissolution, and the plaintiff in such a suit 9351
has more to prove than is necessary to obtain a decree in the Government suit. It becomes important, therefore, to inquire into the relationship which the defendant bore to the powder trade generally at the time when the plaintiff asserts its promotor first declared his intent to engage in the powder business and its subsequent relationship toward such trade generally, and to the plaintiff in particular, during the years 1903 to 1908, within which period the plaintiff claims it was being injured by reason of the acts of the defendant and which it alleges were unlawful and within the operation of the Anti-Trust Act, as attempts to monopolize the powder trade.

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"The mere fact that the defendant owes much of its growth and power in the trade to unlawful acts of the past, and that it continued to enjoy the fruits of some of such unlawful acts, does not make it liable in damages in a suit of this character."

9. In refusing to instruct the jury as requested by the plaintiff in its fourth request, as follows:

"You are hereby instructed that it is not material what the degree of the restraint of trade was which the defendants exerted. It is sufficient if their acts only tended to restrain trade."

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10. In instructing the jury as follows:

"Furthermore, the evidence negatives the plaintiff's contention that as a result of the alleged overt acts the defendant succeeded in absorbing more than 95 per cent. of the powder trade. The fact is that the defendant's percentage of both its capacity of production and the trade actually supplied by it was less at the time the plaintiff sold its plant than when the latter began to do business, and that the percentages of both sales and capacity of production of the other manufacturers correspondingly increased during said period."

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11. In refusing to instruct the jury as requested by the plaintiff in its seventh request, as follows:

"It is no excuse that the members of a conspiracy did not intend to violate the Anti-Trust Act. It is the effect of the acts of the defendants and their co-conspirators that you must consider and not the intent or motive which they may have had in performing said acts. It is not, therefore, relevant to the issues in this case whether or not the defendants intended to injure the plaintiff, but the question is whether the plaintiff has been injured by the unlawful acts of the defendants. Intent may be inferred. The acquiring or taking over of the fruits of an unlawful conspiracy is of itself

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prima facie evidence of the intent of those who have acquired those fruits to continue their conspiracy."

12. In refusing to instruct the jury as requested by plaintiff in its thirteenth request, as follows:

"You have a right to consider the evidence not only with reference to acts which relate directly to the plaintiff but also in order to ascertain the general policy of the defendants and to make that policy clear to your minds, you have a right to consider similar acts of the defendants in connection with other persons besides the plaintiff, which may show a general intent or policy on the part of the defendants to restrain trade and create a monopoly."

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13. In refusing to instruct the jury as requested by the plaintiff in its fourteenth request, as follows:

"You are instructed that it is not necessary that the acts which injured the plaintiff and from which it suffered damage were aimed specifically at the plaintiff. The question is whether injuries resulted as the natural and proximate consequence of the unlawful acts of the defendants or any of their co-conspirators. It is enough if such acts were prohibited or made unlawful by the Sherman Act. Any injury which resulted to the plaintiff by means of anything forbidden or declared to be unlawful by that act should be compensated for by you even though it should appear that the plaintiff was not in contemplation by the defendants at all."

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14. In refusing to instruct the jury as requested by the plaintiff in its ninth request, as follows:

"This being a civil action, the rules which require that you should be convinced of the responsibility or liability of the defendants either on account of their unlawful acts or on account of the injury which the plaintiff may have suffered be-

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yond a reasonable doubt do not apply. A fair preponderance of the evidence is sufficient in actions of this character."

15. In instructing the jury as follows:

"In order to maintain this suit, the plaintiff must prove by a preponderance of the evidence that the defendant has been guilty of an attempt to monopolize, within the prohibition of the Anti-Trust Act, and also that in or by such attempt the plaintiff was actually injured in its business or property."

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16. In instructing the jury as follows:

"What the plaintiff fails to prove by a preponderance of evidence must be resolved in favor of the defendant, so that not only do you find for the defendant in case the weight of evidence should preponderate in its favor, but also in every case where there is a balancing of the evidence; so that, as far as these allegations of overt acts are concerned, the defendant is entitled to your verdict in every case where the preponderating weight is not in favor of the plaintiff's contention."

17. In instructing the jury as follows:

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"In conclusion, let me reiterate what I said at the beginning, that before the plaintiff can recover it must prove by a clear preponderance of the weight of the evidence, first, that there was an attempt on the part of the defendant to monopolize the trade, and that by reason thereof the plaintiff was injured; and, secondly, what was the kind and amount of the damage that it thus sustained."

18. In refusing to instruct the jury as requested by the plaintiff in its fifth request, as follows:

"You may also consider in ascertaining the policy of the defendants, the acts of their associates;

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whether they are made parties to this suit or not, and you may consider the dealings and agreements existing between the defendants and their associates as brought out in evidence. It is not necessary that a person be mentioned in the complaint as a defendant in order to make him a co-conspirator. It is possible that the names of all co-conspirators may not be ascertained, but that fact would not change the situation, and if you find that other persons not mentioned in the complaint were co-conspirators with these defendants in connection with their acts towards the plaintiff, you may also consider the acts of those co-conspirators not named in the complaint in an attempt to ascertain the general policy of the defendants."

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19. In instructing the jury as follows:

"No one who enters into a competitive field is guaranteed that he will get any particular share or even a share of the business at a profit, nor does the mere fact that the largest competitor is able to prevent a smaller one from getting a profitable share of the business make it liable in damages to such other. Competition, as it exists under the laws at this date, has within it the element of fight. It permtis fighting so long as it is fair and it permits the fair fighter to go away with the spoils, even though some one in that fight has been injured, and perhaps irretrievably injured in consequence; so that it is not the mere fact that a competitor suffers injury through severe competition that makes the other competitor who may have come out of the fray successfully liable to compensate for the losses sustained by the injured party."

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20. In refusing to instruct the jury as requested by the plaintiff in its twelfth request, as follows:

"You are instructed that it is the policy of the law to encourage men to engage in business for themselves and that business or trade combinations

9364 which may temporarily or even permanently reduce the price of an article traded in or manufactured, by reducing the expenses inseparable from the running of many different companies for the same purpose, are not thereby excused or to be absolved from the condemnation of the anti-trust laws. Trade or commerce in those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein and who might be unable to readjust themselves to their altered surroundings. Mere reduction of price of the commodity dealt in might be
9365 dearly paid for by the ruin of such owners and the absorption or control over one commodity by an all-powerful combination of capital."

21. In instructing the jury as requested by the defendants in their fortieth request, as follows:

"There is no evidence showing that any of the defendants knew or had anything whatever to do with the purchase of the Buckeye Powder Plant and property by Mr. Olin and his associates, and therefore you must not consider the fact of such purchase as tending to establish any combination or conspiracy or other conduct prohibited by the Sherman Act."

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22. In instructing the jury as requested by the defendants in their forty-first request as follows:

"There is no evidence in the case to show that the defendants or any of them at any time exercised any control of any kind over the United States Powder Company or the Egyptian Powder Company, and therefore you must not consider any claim to the effect that they had exercised such control."

23. In instructing the jury as requested by the defendants in their forty-second request, as follows:

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"There is no evidence to the effect that the defendants or any of them exercised any control at any time over the affairs of the Equitable Powder Company or the Austin Powder Company by virtue of any stock that they have held in those corporations, and therefore you must not consider any claim to the effect that they had exercised such control."

24. In refusing to instruct the jury as requested by plaintiff in its twentieth request as follows:

"You are instructed that an employee of a corporation or person who is engaged in an unlawful combination to restrain trade and commerce is not a co-conspirator unless he acts independently and beyond the scope of authority which is conferred upon him by his employers. If, therefore, you find that R. S. Waddell was at any time acting as an employee of one of the defendants or any of their co-conspirators, during the period while they were engaged in the performance of any unlawful act, you are not thereby to conclude that the said Waddell was a co-conspirator in the performance of any of said acts." 9368

25. In refusing to instruct the jury as requested by plaintiff in its twenty-first request, as follows:

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"You are instructed that the acts done by these defendants must be judged irrespective of any acts which may have been done by the plaintiff or any officer or person connected therewith. The right of an individual to enter into business is nowhere restricted by the law. And you are further instructed that R. S. Waddell had a right to go out and build up an independent business of his own. The question involved in this case is whether the defendants themselves have violated the anti-trust laws of the United States. And if you find that they have violated said laws then they cannot excuse themselves because it may appear that some other person or corporation against whom their

9370 acts were directed may have been guilty of the same unlawful acts. The anti-trust act has its own penalties for violations of its provisions. It contains nothing that sanctions the argument that an offender against it shall be deprived of redress from a civil injury on the plea that he has been guilty of an infraction of that act. The act gives a remedy to any person injured in his business or property by virtue of any of the things prohibited by the act and does not suggest that such person make invoke unlawful acts of others as a defense to its liability. You may disregard all statements by witnesses or counsel in this case with reference to any violations of the anti-trust act by the plain-
9371 tiff or by Mr. Waddell in determining the guilt of the defendants and should not allow any such evidence or statements to in any wise influence your judgment in considering the responsibility of the defendants to the plaintiff."

26. In refusing to instruct the jury as requested by the plaintiff in the twenty-second request, as follows:

"If you find that R. S. Waddell, previous to the time when he organized the plaintiff, was shadowed by detectives you may consider all the facts and circumstances surrounding the employment of such
9372 detectives and what the purpose was; and if you find the purpose of the employment of such detectives was to interfere with the said Waddell in securing a location for the erection of a plant for manufacturing explosives, and that such purpose was a part of the plant of the defendants to prevent the entrance of an independent competitor into the powder trade, then you are instructed that such purpose was an unlawful and wrongful purpose on the part of the defendants, to injure the plaintiff. Shadowing by detectives may be suggestive of criminality and it may be fatal to public esteem and productive of public contempt and ridicule and may be actionable in itself. The effect of shadowing by detectives may be directly to

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harrass the person shadowed and to embarrass him in his business. The injury to the plaintiff by reason of the employment of detectives may not have been direct, it may have been indirect, and one of the elements of the general scheme employed by the defendants to carry out their purpose to control and monopolize the powder trade."

27. In refusing to permit plaintiff's witness, R. S. Waddell, on redirect examination, to answer the following question:

"Q. Upon your cross-examination you were asked if you told your attorneys the facts recited in the complaint with reference to the purpose which the du Ponts had in view in putting detectives on your track. Now I would like to have you state how you arrived at your conclusion, that that was the purpose of defendants in putting detectives on your track." 9374

28. In refusing to receive in evidence a letter, offered by the plaintiff, reading as follows:

Chicago, Feb. 13, 1903.

H. A. Koach, Esq.,
c/o Stratford Hotel,
Cincinnati, Ohio: 9375

Dear Sir—This will be handed to you by Capt. H. R. Saville of the Philadelphia Agency, who has been engaged in shadowing the party I wired to you about in cipher, as follows:

"Wire immediately if R. S. Waddell of Wilmington, Delaware, is now in Cincinnati; think can be found South East corner Third and Broadway. Want to place shadow; therefore, inquire carefully."

and to which you replied as follows:

"Mail at party's office Union Trust Building in-

9876 *Assignment of Errors Nos. 29-30*

dicates he will arrive tomorrow. He has home and family in this city."

Will you kindly assist him as much as possible in locating the party, and just as soon as he locates him, he is to wire to Chicago for assistance.

Yours truly,

(Signed) J. H. Schumacher,
Sup't.

29. In instructing the jury as follows:

9877 "There is no evidence whatever which would justify you in finding that the defendant hired detectives to track Mr. Waddell for the purpose of forestalling him in the purchase of a site, and to create opposition among the people to the location of plaintiff's plant in any place by instilling fear or otherwise, or by bidding up the price of any property plaintiff might have desired to acquire so as to prevent the entry of a competitor into the black powder business. The fact, however, that detectives were employed by the defendant to shadow Mr. Waddell after he had severed his connection with the defendant, and after his declaration to embark in a competitive business, is a circumstance to be considered by you in connection
9878 with the other testimony in the case upon the alternative questions whether it shows a hostile purpose upon the part of the defendant against Mr. Waddell's contemplated enterprise with the view of suppressing competition, or whether it was but a step taken by the defendant in the protection of its legitimate interests, namely, to prevent their employees from being taken from them by this prospective competitor, which latter is the explanation offered on behalf of the defendants."

30. In instructing the jury as follows:

"This suit is unique in many respects. The plaintiff, as a corporation and as a competitor in

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the powder business, is due to the efforts of R. S. Waddell, its chief witness in the suit. He organized it shortly after he separated himself from his employment with the defendant with which and its predecessors he had been identified for about twenty years. His services, while in the employment of the du Pont interests, brought him in touch with their business policies and operations in the vending of powder. He knew of the existence of the trade associations and of such of the restraints and limitations put upon its members as related to the apportionment of the trade and the fixing of prices. The compartive size of the defendant's capacity for output in relation to other powder manufacturers, and its influence as a factor in the trade generally, were known to him where he severed his connection and when he conceived and began to carry out his purpose of entering into such powder field as a competitor. The plaintiff does not occupy the same position as a competitor in existence during the period that this influence was being developed and who may have been, during the course of such development, as well as after it had reached the height of its power, injured in its business or property by reason thereof, but is here as one entering the competitive field when such growth and influence have been established. To it, this influence and power of the defendant, when it, the plaintiff was launched into the powder field, is not in itself actionable, even though that status is due in part to methods which are prohibited by the Anti-Trust Act, and before the plaintiff can recover it must establish that the defendant used its power in the trade oppressively, not necessarily against the plaintiff alone, but at least in the conduct of its business generally; that is, that it used such methods as, backed by its influential position, tended to the suppression of open competition and to obstruct the free flow of commerce—the trade conditions sought to be secured and protected by the prohibitions of the Anti-Trust Act, and that it, the plaintiff, was injured by reason thereof."

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9382 *Assignment of Errors Nos. 31-32*

31. In instructing the jury as follows:

"Mr. Waddell, as already stated, was well advised when he promoted the plaintiff company, of the defendant's business, capacity and policies. He had been its agent for a long period during which several severe competitive struggles took place, and he knew the outcome thereof, and which was, generally speaking, the taking over in one form and another of such new comers, and at least in one instance—that of the Indiana—at a considerable profit to the owners of that company.

"Of course Mr. Waddell, or the company which
9383 he formed had a right to go into business, and the motive for entering into such business is of little moment so far as their rights were concerned; but if he was actuated by the belief that his company would meet with a like experience after some competitive struggles, it may have a bearing upon the question whether the plaintiff was sufficiently capitalized to engage in the struggle for the market already occupied. Of course, if you find that it was sufficiently capitalized, or that it had sufficient financial backing to weather a struggle carried on under normal or lawful competitive conditions, that is a sufficient answer, and it would make no difference whether it was or was not sufficiently capitalized to meet a competition forced upon it
9384 by uunlawful means."

32. In instructing the jury as follows:

"There is no evidence, gentlemen, that would sustain the allegations made by the plaintiff that the defendant spread broadcast any of the information of facts or rumors which it obtained through the trade reports of its agents in such places or among the trade where it would result to the damage of any of its competitors, or that the defendant sought to destroy or injure the plaintiff's credit, or that it did anything to create distrust among the plaintiff's creditors, or that it circulated or fathered false rumors of the plaintiff's

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solvency or that of any of the other competitors, or that it tampered with the plaintiff's processes of manufacture, or that it misrepresented the capacity of plaintiff's mills, or that it circulated false and damaging statements of accidents that occurred at the plaintiff's mills, or that it circulated false and malicious statements concerning the quality of plaintiff's powder, or that cash, intoxicating liquors, household goods and clothing were distributed among miners to secure their influence with their fellow workmen to effect boycotts, or that it employed persons to enter plaintiff's mills to ascertain its business secrets, or that it made offers of financial assistance to consumers of powder to secure their orders or business, or that it sold its product below actual cost, or that there was any arrangement between defendant and the Eastern Dynamite Company and the International Smokeless Powder and Chemical Company or any of the alleged co-conspirators whereby they would reimburse the defendant for the losses sustained by it in selling its powder below cost; and my instructions to you are, as to these particular allegations, that they have not been established, and you will therefore disregard them entirely in your further consideration of the issue here being tried."

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33. In refusing to instruct the jury as requested by the plaintiff in its twenty-third request, as follows:

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"You are instructed that the employment of miners or other persons to circulate among the users of black blasting powder in coal mining operations to cause them to become dissatisfied with or to object to the use of powder manufactured by the plaintiff and to make protests and complaints to their employers against the use in their mining operations of powder manufactured by the plaintiff, is evidence of the purpose and policy of the defendants to drive the plaintiff out of business."

Assignment of Error No. 34

9388

34. In refusing to permit the plaintiff to read to the jury certain questions and answers as set forth in the deposition of William J. Thrush, a witness for the plaintiff, said questions and answers being as follows, to wit:

"Q. State how it came about that you came to be employed by Mr. Moffatt to represent the Dooley Brothers at Hanna City. A. He wrote me a letter; he was personally acquainted with me, and he wrote me a letter and told me to come to town; and I accepted the letter and came down to see him. I met him here at Smith Hotel. He said,
9389 'Get in the buggy and we will go down home.' We went down on Western Avenue—that's where he lived at that time. He said, 'I got a proposition to make to you'; he said, 'If you will get this powder installed out there in place of the Buckeye powder, I will pay you a commission on it.'

"Q. Now what did you say in response to his proposition? A. I told Mr. Moffatt, I said, 'All right, I will go out there and do the best I can for you.'

"Q. Was there any agreement made between you at that time as to what compensation you were to receive for your services? A. Yes, sir.

"Q. What was that? A. Five cents a keg.

"Q. For how long was that agreement to con-
9390 tinue? A. As long as they used—now, when we made that agreement, it was as long as they used that powder, but it didn't continue that long.

"Q. How long did it continue? A. I believe it continued about a year and a half or two years.

"Q. During this time, did you receive any compensation for your services, in pursuance of the arrangement which you have just testified you made with Mr. Moffatt? A. Yes.

"Q. State, as near as you can recall, how much compensation you did receive from that source. A. I wouldn't state positively how much, but something like $100.

"Q. From whom did you receive that money as it came due? A. From Mr. Moffatt.

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"Q. Where was the money paid to you? A. At different places.

"Q. State the places, as near as you can recall. A. Generally at Dooley Brothers' office, where I could see him; he was most always there.

"Q. Was the money paid to you over the counter? A. No, sir.

"Q. From whose hand did you receive it? A. Mr. Moffatt's.

"Q. Describe the circumstances under which you received the money from Mr. Moffatt; where and just how it was paid to you. A. It was paid to me in different shapes, sometimes.

"Q. You have testified you received some money 9392
from him at the office of Dooley Brothers; describe the circumstances and the manner in which that was paid to you. A. I always went in the back room, and Moffatt would come in the front room in the office part, and he would come to me this way, walking over to me and touching my arm, and he would drop the money in my hand, and I would put it in my pocket and get out.

"Q. Describe any other locations or places where you received money from him. You stated you received it from him from different places. A. At one time I come in there, and he said, 'I want to see you'; 'All right; come down and have a drink,' I told him I wasn't drinking, and he said, 'Come down and have a cigar'; and we went down to that middle saloon right around the corner from his 9393
building.

"Q. Around the corner from the Dooley Brothers? A. Yes; and when we got there, we sat at a table, and he gave me the money over the table.

"Q. Now, did you state how long this arrangement with Mr. Moffatt and Dooley Brothers continued? A. Dooley Brothers had nothing to do with it.

"Q. You made your arrangement with Mr. Moffatt? A. Yes, sir.

"Q. How long did this arrangement continue? You have answered that question already, but I want to refresh my mind. A. It continued very near two years.

9394 "Q. It began in 1907—what part of the year? A. I couldn't just recall it."

"Q. After the Western powder became installed in the mines, did you continue to receive any further payments from Mr. Moffatt? A. No, sir.

"Q. I wish you would state in a general way, in your own way, just how you went about performing your duties under your arrangement with Mr. Moffatt, for the purpose of keeping Buckeye powder out of the mine and securing the use of du Pont powder. A. The grounds that I worked on was the commission I was getting out of it, and I used my influence the best I could to get that

9395 powder in.

"Q. Tell some of the things you did; some of the ways you used your influence. A. I was an expert miner in that coal, and worked in it so long, and I used to get out considerable coal, as much as any of them, and more than most of them there, and I said, 'Why don't you use the same kind of powder; why don't you use some good powder,'; I said, 'Look at my bulletins; I don't use as much powder as you do, and I am getting out more coal.' They said, 'What are you going to do; they send in this keg to me?' and I said, 'Exchange it; they will take it back.'

"Q. State whether or not, in your experience as a miner, and also as a member of the Miner's Union and a member of the Miner's Committee, how the

9396 members of the Pit Committee are regarded by the miners as a body.

"A. They are regarded as a refuge for to go to them for to get advice and to get difficulties adjusted.

"Q. State whether or not, as a rule, and in your experience, the men who are selected upon the Pit Committee are men with experience and who have the confidence and respect of their associates.

"A. They are picked as men with ability to know."

35. In refusing to permit the plaintiff to read to the jury certain questions and answers as set

forth in the deposition of William J. Flauaus, a witness for the plaintiff, said questions and answers being as follows, to wit.:

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"A. I will state that being the secretary of the Local and when they had a meeting, when any objections came up in regard to powder they were using, quite a number of the miners stated that they were getting inferior powder, and that their contract called for $1.75 for their keg, and they were getting powder that wasn't up to the standard; they were getting inferior powder, they said, and they ought to get a good standard powder; and we had quite an argument in the Local that night, and I was secretary of the meeting this night when the objection came up in regard to the powder; and we had quite an argument that night, and the Local officials were instructed to take it up with the company and see if something was wrong, or something could be done.

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"Q. What was the result of the instruction which was given to you by the Local; what steps, if any, did you take? A. I went with the president, and we took it up with Mr. Eden; we went together, and we took it up with him and Mr. Eden told me he was surprised to learn there was any kick coming on the powder; that they had to change contracts in recent years, and he said they had made a new contract some few months prior to this, and he didn't know why all the powder shouldn't be the same, and he seemed to leave the impression that the men just wanted to kick; but it kept getting worse, and they had a devil of a time, and they didn't get as much tons of coal as they used to do. So we reported that to the men; that was about all we could do; and he said he would take it up with the powder company immediately and see if they were not sending powder according to agreement. It went on for a week, and the miners got me on a foot car, and we called an indignation meeting, and we took the powder question up, and they stated that no other man should buy a keg of that powder; and we run for about five days,

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9400 and we didn't get out much tonnage; nobody was shooting much. Finally we took the case up with the State officials, and they came down, and they failed to do anything, and he ordered a strike on us; prior to that we were fooling around there. I was coming up the street one evening, and while I was there, one fellow came up the street and hollered, 'Hey, Flossy, I want to see you'—that's what they used to call me, some of the fellows, 'Flossy'; and he said a fellow over in the saloon wanted to see me and the officers of the Local. I goes over to the Palace saloon, and I met a large gentleman named McCollie, and he introduced himself, this
9401 fellow did, and we got familiar, and we called him 'Mack.' So he got newsy, and he wanted to know my position in the Local, and I told him the secretary; and he said, 'I want you to get some of your officers and practical miners together, and I want to have a talk with them. You are making a fight upon our powder.' Of course, I didn't care a damn

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"*By Mr. Katzenbach*:

"Q. This was Miami powder? A. Yes; and I said 'All right.' I went out and counted up nine or ten or fifteen of the boys, and we set around a nice big table and he out with a row of bills, and he said, 'Give these boys something to drink.' Well, we wasn't going to let that go by, and we sat there until the saloon closed, talking powder. And he
9402 showed us a lot of samples, and showed us that it was impossible for that powder to be wrong; and he said he had all grades of powder from 'C,' 'F,' all the way along, and some was as big as marbles; and he gave me bottles of powder to show to the miners; and he said that I could keep it in my desk and display it to the miners.

"Q. Who gave you this powder? A. Mr. McCollie, he gave it to me; I took it up and showed it to the boys, and they all swore that wasn't the powder that was in their kegs. We didn't know what was up the tree, and we wanted to be on the right side, so they fetched in some that was in their kegs; and all the mines that were in the one local, they had 1,100 members, and one man was using

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King's, and another was using Du Pont, and we told these boys to fetch in samples and we would see what was doing. When they fetched in from the other mines, we didn't get any King's; I believe they said they were out; we didn't get any King's, they were borrowing powder. You see one mine would be using King's and another mine using Du Pont's, and we didn't get any King's; they said they were out, and they were borrowing Du Pont's; they were out of King's at that time. We got some Du Pont's from Forester's, and we put them alongside of the samples Mr. McCollie gave us, and you couldn't tell the difference in the powders; but not one of them fetched the powder that our boys was using; there was quite a difference.

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"*By Mr. Abbott:*

"Q. Now, state more clearly what you mean—I will ask you what you did, if anything, after you had these samples and made these comparisons which you have indicated. A. Yes, sir, we took the samples down to Mr. McCollie, and in the meantime, Mr. Sharp; he claimed he was the representative of the Illinois country, and he was helping Mac demonstrate this powder, and Mr. McCollie said, 'There does appear a little difference, and in order to give it a start, I will order a dozen kegs or so sent out from our office, and I want you to pick good men and let them try it'; that's what he said, and I said 'All right'; he said, 'They'll get a free keg of powder, and you won't have any trouble selecting your men.' Well, that powder worked fine; for about a week we would meet him over in our headquarters—it was in the saloon; and we kept notifying other miners, and inviting them in; finally, it got to be a pretty nice thing, that powder man being there treating them nights. On Saturday evening Mr. McCollie said that he was told that you couldn't get a drink here on Sunday; I said, 'That's all right,' and he said, 'I'll tell you what I want'; I said, 'All right, anything that's legitimate is all right.' He said, 'We want to demonstrate to you that our powder is all right,' he said, 'Mr. Sharp and myself worked among the miners while Mr. White is sales agent—he does

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9406 *Assignment of Error No. 35*

the selling, but we are attending to the miners' troubles, and we want them to decide to use our powder.' He said, 'Get as many of the boys for a nice time to-morrow.' He said he was told they couldn't get a drink, but that would be all right. He said, 'Do you know where we could get a good hall?' and the bartender said, 'Yes; I know a place and a fellow who's running a barber shop up there, and they have a club room there,' and he said, 'They have cards and things, and you could have a few drinks, and I could get that for you'; and he said, 'You get it, and I will pay whatever is right'; and he said, 'It falls between you to fix
9407 up a list of what is good, and we want to have a hell of a blow-out'; and I said, 'All right, how many do you want?' and he said, 'Any miners you want to ask up'; and I asked the bunch, and he jacked out this big roll, and gives me in the neighborhood of forty-five or fifty dollars—I can't recollect now the exact amount—and he said if that wasn't enough, that he wasn't broke, that I should draw on him for more. And I gets a lot of chickens and gets in with the young lady to fry them up, and I ordered ten or fifteen kegs of beer, and then I invited the boys to the blow-out; he told me to do that, and that he wanted to meet the miners and do become more friendly, and he said that he didn't want us kicking on the powder; if there was anything wrong, he wanted to know it. And we had a
9408 damned jolly time all day Sunday, and Mr. McCollie was a fun-maker for us, and he sung and made speeches, and we had a splendid time, and there was about half of the committee up there; the rest of them were average miners.

Q. What committee? A. The powder committee.

"Q. A regular or a special committee? A. A special committee.

"Q. Who were the members of that? A. Jim Cross, George Armstrong, and I can't think of all of them at this time.

"Q. What were the powers of this special committee? A. They were appointed to meet with the operators and also the representative of this powder, and see if they couldn't get an adjustment of the reason why this power was inferior as it was.

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"Did they afterwards meet with the powder men? A. Yes, sir.

"Q. Tell what steps were taken, if any, after that, to determine the matter of the quality of the powder. A. After Mr. McCollie had sent for these sample kegs, he said, 'They come out of the magazine, and the car is loaded in the same manner.' That showed up pretty good, and we called upon Mr. Eden and bought the powder again. He said, 'I can give you du Pont powder,' and I said, 'No, under instructions from the Local, we don't want nothing but "Double F" Miami powder.'

"Q. Had you made any test or trial in which Du Pont powder figured? A. In the same thing, not a quarter of a mile away——

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"Q. At this time? A. We made the test later on.

"Q. Then, go on with your story. A. So Mr. Eden got awful mad at me; they called me 'wind jammer' or something. It didn't make any difference to me which powder they used, one was about as costly as the other; and that's what he said, and I said the boys didn't want Du Pont, they wanted 'F. F.' Miami; and we got in a wrangle.

"Q. What was the result of the notice or demand which you gave to him? A. The boys came out on strike; they wanted that powder, and we didn't care, we had our nice time; and so the boys, they came out on strike.

"Q. Why? A. Because Mr. Eden then wouldn't make use of Miami powder; so we came out on strike and sent for the State officers, and they came down there, and he came down there, and I believe he used these words—he said, 'Boys, I believe you have played behind the curtain long enough, it's time to raise it; you come out until the company gets you the powder you think you can do the work with.' We were out on strike for several weeks, and I kept getting commissaries from the State.

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"Q. By 'commissaries' what do you mean? A. You know when you are ordered on strike by the State officials, they pay the miners so much a week.

"Q. I wish you would state, if you know, what was the result of this strike which was called; how

9412 long did it last? A. Well, it lasted several weeks. In the meantime, while the strike was going on, we discharged some of them off the committee; one of the committee wanted Du Pont powder, and they told him he wasn't right, and one of them got him. Mr. McCollie had promised them a box of shells to go hunting with, and he hadn't got them; and we kept getting commissaries, and it run away up into the thousands; and it come time then for the convention at Peoria.

"Q. The convention of what? A. The miners.

"Q. What convention is that technically known as? A. The United Mine Workers' convention at
9413 Peoria. And so we selected a couple of delegates to go up there, and knowing that we were still on the commissary list, I got a letter stating we were off the commissary list; and they sent our delegates back to tell them there had been some fraud about the thing—that the powder men had bought some of us local officials. So our delegates went back to the convention, and the miners got back together again, and they decided to have a test between the Du Pont and Miami powders; and the miners were to select a miner, and the company was to select a miner, and the miners was to put a man on top to count the tonnage, per cent. of screening and the lump coal.

"Q. Was that test held or not? A. Yes, sir.

"Q. What was the result of that test, if you
9414 know? A. We got a notice from the convention that we should go to work, and that we would have that test. When I got the communication, I called a special meeting of the miners and protested against any such decision; so they sent a committee to the convention to serve notice that if we didn't get to work and take up the test, we would be fined ten dollars; se we had a test, and we tested Miami so many days and Du Pont so many days, and there was such a little difference in the test of the powder, and the difference was nothing much—and we returned to work.

"Q. You did return to work? A. Yes, sir, after we had been out several weeks, I guess. Counting wages and the money we derived from the State funds, amounted to over seven thousand dollars.

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"Q. What powder did you use after the test? A. Miami.

"Q. How many members of your Local Union were there at the time of this difficulty that you have testified to? A. The time we had the powder strike?

"Q. Yes. A. Well, the membership of the Local was between ten and eleven hundred; all the men affected by the strike was in the neighborhood of six or seven hundred.

"Q. Now, do you know of your own knowledge, what was the action of the convention at Peoria with reference to the owner of the mine concerning that strike? A. I know that the operators made a demand that they be reimbursed.

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"Q. Do you know whether he was reimbursed or not? A. I do not.

"Q. Do you know, of your own knowledge, whether any money was paid by either the powder representatives that you have testified regarding, to any other person than yourself at that time? A. I will only state in regard to the money transaction, all I know is what I got.

"Q. Do you know who was the representative of the du Pont Company that was there at that time?

"Q. I will ask you whether or not there was a representative of the du Pont Company there at the time of this disturbance? A. During the strike there was a man met me in the saloon there, and introduced himself, but what his name was, I don't know; I had one drink with him, and I don't remember his name. I told him to stay away.

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"Q. Can you describe him? A. Yes; he was about forty years old, forty years of age, and about my height, and somewhat slimmer than I am.

"Q. Do you know where he came from? A. No.

"Q. Don't you know where he came from? A. No; I know he was a man in the saloon.

"Q. Did he give you his name at all? A. Yes; and said he was representing the du Pont Company.

"*Cross-examination by Mr. Katzenbach*:

"Q. What was the date of this occurrence that you have been talking about? A. Along in the neighborhood of 1907 or the early spring of 1908."

9418 *Assignment of Error No. 36*

36. In instructing the jury as follows:

"One of the instances relied upon by the plaintiff as proof that certain improper influence was exerted against the plaintiff's powder is what has been frequently called in this case the "Thrush Incident," and which occurred at the Hanna City mines of Appellate & Lewis. That is in Illinois. At this mine there was considerable contention and strife over the use of both the plaintiff's and defendant's powders. Before the advent of the plaintiff the du Pont powder had been used for a number of years at these mines, but for a few months preceding the
9419 contest here referred to the Buckeye powder had been in use more or less. It was to the interest of the owners of the mines, if the plaintiff's powder was as satisfactory as the defendant's, to use the plaintiff's powder, as the mines were within four miles of the plaintiff's mill and they would not be required to purchase as many kegs at a time as was required in the handling of the defendant's powder. Mr. Lewis, one of the owners of such mines, and their superintendent, Mr. Robert Morton, testified that they had had good results with the plaintiff's powder. As per their testimony, they had less screenings in the use of such powder than theretofore, and it was to the pecuniary advantage of the operators to have as little screenings as possible, that result induced them to adopt plaintiff's
9420 powder. For a time both the plaintiff's and defendant's powders were used, each having its particular advocates among the miners. The contest among the miners over these powders reached such a stage, however, that the owners had considerable difficulty in their purpose of having the plaintiff's powder used at their mines, a number of the miners protesting against its use. This resulted in a test being ordered by the miners' union. While this test was going on each of the powders had a paid representative among the working miners, one acting in the interest of the plaintiff's powder and the other in the interest of the defendant's. Alec Thrush, representing the plaintiff's powder, received $1.00 a day for a period of time. The period

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is in dispute between Mr. Thrush and Mr. Waddell. William J. Thrush, a relative of Alec Thrush (I understand he was a relative, although he may have been a distant one), working in the interest of the du Pont powder, received five cents for each keg of such powder that was used there. Both of these Thrushes were membrs of th Pit Committee and therefore in an influential position. Robert Morton, the superintendent, testified to the character of the test which proceeded for some days, and his evidence tends to show that the test was not fairly conducted on the part of the representatives of the du Pont interests, they aiding the effects produced by the defendant's powder by undercutting the coal in the solid. The result was that the test was discontinued on the order of Mr. Morton and the owners abandoned their attempt to keep the plaintiff's powder in their mines and the du Pont powder took its place."

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37. In permitting R. S. Waddell, Jr., a witness for the plaintiff, while on cross-examination, to testify as follows:

"Q. Then in making the calculations of cost of the powder, of this ingredient, nitrate of soda, you did not enter the cost at what you were paying at the time under your contract of nitrate of soda, but at what you took from the newspapers or other data as the prevailing price of nitrate of soda, is that correct? A. No, sir. I would like to explain if I may just how we arrived at that."

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38. In refusing to permit R. S. Waddell, a witness for the plaintiff, while on direct examination, to answer the following question—he having been permitted to testify that he had applied to purchase powder manufacturing machinery, for the use of the plaintiff, to Prox-Brinkman Manufacturing Co. and to I. & E. Greenwald & Co., to Pusey & Jones, and to Olin Scott and to Allentown Foundry & Machinery Co. (each of whom were makers of pow-

9424 der manufacturing machinery) and had been refused by each of them, and the court having refused to permit him to state what were the reasons for such refusal:

"Q. Now I will ask you to answer the general question whether the reasons that were given to you by each one of these parties were of a similiar character or not."

39. In instructing the jury as follows:

9425 "As to the forestalling plaintiff in securing powder-making machinery. The only evidence on this head is the deposition of Jacob E. Schoemel, agent of Prox-Brinkman Mfg. Co., which shows that that company had a contract with the Indiana Powder Company whereby such manufacturer of machinery agreed not to make machinery for any one but the Indiana Powder Company and one other manufacturer named and in consideration of which the Indiana Powder Company agreed to take $5,000 worth in repairs to or new construction of machinery a year for a period of five years, or to pay such manufacturer twenty per cent., as profit, for any part of said $5,000 worth of work a year which they should not take. At the time this contract was made, June 3, 1902, as well as when Waddell first
9426 sought to obtain machinery for his plant, the Indiana Powder Company was owned by the defendant."

40. In refusing to instruct the jury as requested by the plaintiff in its twenty-fourth request, as follows:

"You are instructed that efforts to employ railroad agents or employees to divulge information concerning consignments which might from time to time be made by the plaintiff to its various customers is evidence of the purpose and policy of the defendants to drive the plaintiff out of business

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and is therefore an act prohibited by the Anti-Trust Act."

41. In instructing the jury as follows:

"As to the charge that the defendant employed railroad employees to make telegraphic reports or other kind of reports of the plaintiff's shipments, and which information was used to get consignees to reject plaintiff's shipments, there is no proof that the defendant was able to have the consignments of plaintiff's powder cancelled by reason of any information obtained from railroad employees concerning such consignments, or that they ever 9428
succeeded in getting such information from such employees, but there is evidence in the case that one named Piatt, who was an agent of the defndant, sought to hire Harry Paige, commercial agent of the C. B. & Q. Railway, to give him (Piatt) information concerning the shipments of the plaintiff's powder, offering to pay for such information at a named rate—$5.00 a letter, as I recall it. This was peremptorily refused by such agent, and as I recall it it is the only proof of any attempt to secure such information. This, of course, was a reprehensible act. What does such an act, in the light of all the circumstances surrounding it, and keeping in mind other facts in the case bearing upon the keen competition that took place between the defendant's and plaintiff's powders in that dis- 9429
trict, indicate? The plaintiff was a newcomer in a field already occupied. Except as to new business, it is inevitable that in order for the plaintiff to place its output it would draw some of the custom that theretofore had been flowing to the defendant or some other competitor. All of them had a right to compete for such business. None of them had the right, however, to use any but lawful methods. To retain one's own customers obtained by lawful means or to secure new ones is lawful, provided no unlawful means are used. The mere ascertaining to what person or place a competitor's product is being shipped is a legitimate means of keeping tab on the trade, and if a par-

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ticular competitor has been making inroads upon the established trade of another, such other may properly keep a surveillance over the conduct of such new competitor; but, while this is lawful, it may be readily noted that an unlawful use of such information may be made."

42. In refusing to permit R. S. Waddell, a witness for the plaintiff, while on direct examination, to state what it was that caused him, as president of the plaintiff, to make an investigation for the purpose of ascertaining how it was that advices were received by him from persons to whom consignments of black blasting powder had been shipped from the shipment office of the Buckeye Powder Company—giving the definite car number of the car in which shipment was made and all the details of the shipment—before notice of that shipment had been received at the business office of that company.

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43. In refusing to permit John G. Miller, a witness for the plaintiff, while on direct examination, to answer the following question—he having already been permitted to testify that while he was selling the product of the Buckeye Powder Company he received information concerning the business of the Buckeye Powder Company from sources other than that company, and that one of the sources of that information was a customer named Steve Bailey, of Fraser, Iowa..

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"Q. What information did you obtain from Steve Bailey?"

44. In refusing to permit John G. Miller, a witness for the plaintiff, while on direct examination, to answer the following question—he having already been permitted to testify that he called the

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attention of the Burlington Railway Company officials to the situation relative to information concerning the shipments made by Buckeye Powder Company to its customers coming to him from sources other than the Buckeye Powder Company, and that said officials made an investigation:

"Q. Now, do you know what the result of that investigation was?"

45. In refusing to receive in evidence on behalf of the plaintiff certain letters written by J. H. Somers & Company to the Buckeye Powder Company, 9434
reading as follows, to wit:

"J. H. Somers & Co.
Cleveland, Sept. 10, 1904.

Buckeye Powder Co.,
Peoria, Ill.

Gentlemen:

Your Mr. R. S. Waddell was here the 5th and promised to send me some samples of your powder. One or two other large users of powder with their offices in this city have been in to see me in regard to your powder. I have asked them to defer their orders or any changes they would make until after these samples had arrived and we had made a thorough investigation of your ability to turn out the kind of powder we require. 9435

The samples Mr. Waddell had with him were beyond question in regard to quality, etc. Some of these other companies I speak of have no contract for powder, consequently you could start to doing business with them at once. It is a little different with us; we are tied up with a contract for the next few months but expect to make some change if we are not taken care of a little better than we have been.

Please forward these samples at once, and oblige,

Yours truly,
J. H. Somers & Co.,
Wm. D. Somers, Pur. Agt."

9436 *Assignment of Error No. 45*

"J. H. Somers & Co.
Cleveland, January 31, 1905.

Buckeye Powder Company,
Peoria, Ill.

Gentlemen:

We have yours of the 28th inst., and in reply will state our present contract does not expire until March. It might be well for you to take this matter up with us at that time.

Your statement that your powder is "excelled by none" must be correct, as we have heard several parties speak well of your product, and we have a set of your samples, which also speak well for
9437 themselves.

We use very little Single F powder. In Michigan we use only FF. Our three mines in this territory have used about 6,000 kegs of FF since October 1st. When Mr. Waddell was in Cleveland he stated your mill was either well supplied with F or FF, the writer does not remember which.

We have been informed that you have been very successful in your new enterprise, and we are very glad you have met with this success, which no doubt, is due you.

Yours very truly,
J. H. Somers & Co.,
Wm. D. Somers, Pur. Agt."

9438 "J. H. Somers & Co.
Cleveland, March 8, 1905.

The Buckeye Powder Company,
Peoria, Ill.

Gentlemen:

We have yours of the 3rd inst. with reference to furnishing powder for our Michigan properties, and note what you say in regard to Mr. Steven Corvin, as being your agent. You have failed to quote us prices on powder, and we would ask you to kindly take this matter up at once and give us your best price delivered, St. Charles, Mich.

We have purchased 7,200 kegs of FF powder since October 1st for these properties and you can tell by these figures about how much we will use

9439

per year, especially as the coal business in this particular district last winter was not very good.

We might say in conclusion that we expect to buy powder a little cheaper this year than last, and this business, no doubt, will be yours if you quote the right price.

Yours very truly,
J. H. Somers & Co.,
Wm. D. Somers, Pur. Agt."

"J. H. Somers & Co.
Cleveland, March, 25, 1905.
The Buckeye Powder Company,
Peoria, Ill.

9440

Gentlemen:

We have yours of the 23rd inst. with reference to furnishing powder for our Michigan mines. We are sorry to state that your price quoted several days ago did not meet favor, and as you said you can meet any price that is named we will wait until you make another quotation before we place this business.

We have a much better price than the one you have quoted and while we are very anxious to give our friend Mr. Corvin this business, yet we cannot see our way clear to pay a higher price for your powder than we would have to pay for the powder we have been using in the past.

Yours very truly,
J. H. Somers & Co.,
Wm. D. Somers, Pur. Agt."

9441

"J. H. Somers & Co.
Cleveland, April 15, 1905.
The Buckeye Powder Company,
Peoria, Ill.

Gentlemen:

We are a little late in acknowledging receipt of your quotation of March 31st, however, we have been thinking the matter over and have been in constant correspondence with our superintendent at St. Charles in regard to the matter.

In your letter you state if any Powder Company made us a better price than 1.05 delivered they were

entitled to the business. We have the better price all right—same being $1.02½, but we have not decided definitely in regard to the Michigan business. As we use a great deal of powder and have always been well taken care of we want to know positively if we can get powder promptly after we have placed our order for the same.

We have been signed up for sometime for our powder in Ohio, and have included the Michigan properties in this contract in a way that we can purchase powder from the same company we purchase our Ohio powder providing we do not give you the business.

9443 We cannot give you any definite information on this matter until our superintendent has time to render his decision.

Yours very truly,
J. H. Somers & Co.,
Wm. D. Somers, Pur. Agt."

"J. H. Somers & Co.
Cleveland, Aug. 23, 1905.

Buckeye Powder Company,
Peoria, Ill.

Gentlemen:

We herewith enclose our order #1248 for one carload of FF blasting powder, price to be $1.02-½ delivered as per your letter of Aug. 21st. You no doubt have been advised by Mr. Corvin that we are
9444 buying our powder for $1.00 per keg at the present time. We are willing to pay you 2-½ per keg on this order as we are anxious to give your powder a trial.

Yours truly,
J. H. Somers Coal Co.,
Wm. D. Somers, Pur. Agt."

46. In refusing to permit the plaintiff to read to the jury a certain letter written by Thomas Mackie to the Buckeye Powder Company, and dated at Kansas City, Mo., May 24, 1906, and reading as follows:

9445

"Kansas City, Mo., May 24, 1906.
"Buckeye Powder Co.,
Peoria, Ill.:

"Gentlemen—We will soon be ready to enter into a contract for our powder requirements for the ensuing year or for the next two or three years, and would be pleased to have you make us a proposition covering same.

"Kindly let us hear from you at your earliest convenience, and greatly oblige,

Yours truly,
Thomas Mackie,
Genl. Pur. Agt."

9446

47. In refusing to permit the plaintiff to read to the jury a certain letter written by Thomas Mackie to the Buckeye Powder Company, and dated at Kansas City, Mo., August 15, 1906, and reading as follows:

"Kansas City, Mo., August 15, 1906.
"Mr. R. S. Waddell,
Prest. Buckeye Powder Co.,
Peoria, Ill.:

"Dear Sir—Referring to your letter of May 26th quoting prices on powder delivered at our various camps for the ensuing year, beg to state that this matter has just been determined and I regret to advise that you were not the successful bidders.

9447

Yours truly,
Thomas Mackie,
Genl. Pur. Agent."

48. In refusing to permit the plaintiff to read to the jury a certain letter signed by the Waverly Coal & Mining Company, by J. W. Ferguson, President, and addressed to the Buckeye Powder Company, and dated at Kansas City, Kansas, February 17, 1906:

9448

"Kansas City, Kansas, Feb. 17th, 1906.

"Buckeye Powder Co.,
Peoria, Ill.:

"Gentlemen—I wired you today cancelling car of CC Special Powder. I am somewhat tied up with the du Pont Company and I am obliged to do this. If you have invoiced this car and it is shipped, or if you consider that the powder belongs to us, ship it at once and date your invoice Feb. 16th. Ship by as slow freight as you please, as I do not care for it before the 1st of March, or even the 10th
9449 of March. I say this because I do not wish to pay for it until say 90 days. If you are willing to do this, ship it as directed, but don't give me away tothe du Pont powder people.

"I will be clear of them in a few months. Wire me what you do. Saying you had shipped Feb. 16.

Respectfully,
WAVERLY COAL & MINING CO.,
by J. W. Ferguson, Pres."

49. In refusing to instruct the jury as requested by the plaintiff in its tenth request, as follows:

"In determining the purpose of the defendants to monopolize or restrain the powder trade, you may
9450 consider the purpose of inducing consumers of explosives to enter into contracts for the purchase of explosives from the defendants. You should consider the nature of these contracts, the general scope and terms thereof, and whether the same constitute a general system. If you find that these contracts were sufficiently numerous to indicate a general purpose to induce consumers of explosives over a wide area to withdraw their trade from competition, then you should find that such contracts constitute an attempt to monopolize the powder trade by eliminating competition.

"If you find that numerous contracts were made with numerous consumers of explosives prior to the time of the organization of the defendants the E. I.

9451

du Pont de Nemours Powder Company, and that such contracts were acquired and taken over by said defendants after its organization, and that such contracts have been renewed from time to time as they were about to expire, you are entitled to consider such facts as evidence of a continuing conspiracy for the purpose of monopolizing the trade in explosives. It is for you to determine what was the purpose and effect of these contracts regardless of any interpretation that may have been put upon the making of said contracts by the defendants or any of the co-conspirators."

9452

50. In refusing to permit plaintiff's witness R. S. Waddell, while under redirect examination, to state what the information was which he gave to plaintiff's attorneys upon which the allegations set forth in paragraph 11 of the plaintiff's amended declaration were based—counsel for defendants on cross-examination having already been permitted to read the said paragraph to the said witness and thereupon to ask him whether he gave his attorneys the information upon which said allegations were based, to which the said witness replied that he did and would be glad to state them to the jury.

9453

51. In refusing to instruct the jury as requested by the plaintiff in its twenty-sixth request as follows:

"If you find that the defendants made prices which were applicable to certain districts where there was competition and which were different from prices which obtained in other districts in which no competition prevailed, you are instructed that this is strong evidence of the purpose of the defendants to restrain and monopolize the powder trade.

"You are further instructed that the policy of making prices which were applicable only in districts where competitive conditions prevailed is a

9454 *Assignment of Errors Nos. 52-53*

policy which it is difficult if not impossible to contend with and is regarded as one of the most effective weapons which can be used in the monopolizing of the trade within a given territory."

52. In permitting the plaintiff's witness Charles L. Patterson, while on cross-examination, to testify as follows—he having already been permitted to testify on redirect examination that the salesboard of the defendant E. I. du Pont de Nemours Powder Company made a price of 95 cents per keg for black blasting powder in certain districts dur-
9455 ing the years 1905 and 1906:

"Q. Who started the price cutting in those years? A. I could not answer that question, Mr. Button, definitely. I know what I think. My best recollection is that the Buckeye Company did it."

53. In refusing to allow John G. Miller, a witness for plaintiff, while on direct examination, to answer the following questions—he having already been permitted to testify that he had endeavored to sell Buckeye Powder to certain persons whom he knew to be under contract to purchase powder from the Laflin & Rand Powder Company, and that
9456 he failed to sell to such persons, and that they gave him reasons why they did not or would not purchase powder of him:

"Q. State what those reasons were as given by them.

"Q. Did any of those reasons which were given to you involve the question of these contracts which were in existence?

"Q. Did any of the reasons which were given to you by these parties or any of them involve the question of special prices that had been made to them by any other manufacturer of powder?

Assignment of Error No. 54

9457

54. In permitting Olive Taylor, a witness for the defendants, to testify as follows:

"Q. Now, Mrs. Taylor, in a suit instituted in the United States District Court for the District of New Jersey, by the Buckeye Powder Company against the E. I. du Pont de Nemours Powder Company and two other companies, known as the International Smokeless Powder and Chemical Company and the Eastern Dynamite Company, the Buckeye Powder Company, in answer to a demand for the names of customers of the Buckeye Powder Company induced by the defendants, or by the other persons or corporations I will name to you, the 9458
Buckeye Powder Company has given the name of Howarth and Taylor as one of the customers of the Buckeye Powder Company which was induced by these defendants and persons which I will name to abandon the purchase of powder from the Buckeye Powder Company. The names of these persons are: Thomas Coleman du Pont, Pierre S. du Pont, Alexis I. du Pont, Alfred I. du Pont, Eugene du Pont, Eugene E. du Pont, Henry E. du Pont, Irene du Pont, Francis I. du Pont, Victor du Pont, Jr., Arthur J. Moxham, Hamilton M. Barksdale, Edmund G. Buckner, Frank L. Connable, Jonathan A. Haskell; and the following corporations: International Smokeless Powder and Chemical Company, E. I. du Pont de Nemours and Company, E. I. du
Pont de Nemours and Company of Pennsylvania, 9459
du Pont International Powder Company, Delaware Securities Company, California Investment Company, Delaware Investment Company, Hazard Powder Company, Laflin and Rand Powder Company, Fairmont Powder Company and Judson Dynamite and Powder Company. Will you now state whether or not any of the persons that I have mentioned here, or any of the corporations which I have mentioned in this question, or any agent or representative of those persons or corporations, ever induced you, as purchasing agent for your husband, Daniel Taylor, trading as Howarth and Taylor, not to purchase powder of the Buckeye Powder Company? A. No, sir."

9460 *Assignment of Errors Nos. 55-56*

55. In permitting the following named persons while testifying as witnesses for the defendants to testify substantially the same as the witness Olive Taylor, as set forth in the last preceding assignment of error: Daniel Taylor, Samuel P. Winters, Harvey L. Byers, George M. Boyd, Cassius C. Thomas, John Galbraith, Samuel F. Pascoe, Robert Woods, Oscar Boetticher, William A. Linn, Edward Shirkie, William M. Carter, Glen W. Traer, Gordon Buchanan, Isaac Waltling, Samuel V. Sholl, James D. Findley, David Z. Thrush, Warren Pye,
9461 Charles L. McCoy, Archibold T. McMaster, Herman Koeppel, Lawrence C. Higbee, Frank Jack, Jacob Glebelhausen, Patrick Martin, Walter B. Ballentine, Frederick C. Carter, James Prendergast, Henry Seffer, Stephen A. Drake, George A. Hibbard, George A. Marshall, Louis Hefeld, Benheart Heintzman, Edward Mohn, George W. Hatch, Louis Blank, Edward Marston, Albert E. Whitehead, James Dalton, George Westerby, Samuel Taylor, Will V. Willis, Alexander Hamilton, William Reidelberger, Jr., Thomas Meek, William Boehmer, Marion T. Raumberger, Frank W. Miles William S. Scott, John J. Ward, Ivan B. Grant, John Alexander,
9462 Edmund C. Donk, George W. Soloman, Edward H. Buckley, Patrick Murphy, David A. Watson, Thomas Axford, Otto F. Lenz, Silas A. Shafer, August Reents, George C. Kanne, David T. Sanders, George R. Hess, Alexander Furst, Timothy E. Gapen, Fred G. Badger, Erasmus G. White, Thomas Simmons, John Gallaway, August F. Metzler, Henry Vonach, Frank O. Pittman, James F. McElwee.

56. In refusing to permit Pierre S. du Pont, a witness for the plaintiff, to answer the following question—he having already been permitted to testi-

9463

fy that a detailed written appraisal of the various properties acquired by defendant E. I. du Pont de Nemours Powder Company was made at the time when said properties were so acquired by said defendant:

"Q. Will you produce that appraisal?"

57. In refusing to require the defendants to produce the appraisal referred to in the last preceding assignment.

9464

58. In instructing the jury as follows:

"As to that part of the charge now being considered, namely, that the co-conspirators agreed with the defendant to reimburse it for any losses that it might incur while carrying on this alleged trade war against the plaintiff, it is my duty to say to you that there is no evidence whatever in this case that would justify such a finding.

"Of course, as to the Hazard and Laflin & Rand Companies, which at this time yet maintained their separate legal existence though their stocks were owned by the defendant, whatever losses would be sustained by the defendant (if any), as the result of the alleged fight for commercial supremacy in the Peoria district, would in a sense be made up by the Hazard and Laflin & Rand if these by reason of their withdrawal from this district were enabled to make a profit in other districts."

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59. In instructing the jury as follows:

"Plaintiff claims thirty cents (30 cents) a keg profit, but there is no evidence in the case that would justify the conclusion that that was a fair profit."

60. In instructing the jury as follows:

9466 *Assignment of Errors Nos. 61-62*

"If the jury believe that the prices which plaintiff received for its powder, although lower than those that prevailed during the life of the trade associates, were the prevalent and normal prices at the time it was engaged in business, it cannot recover damages on that account."

61. In instructing the jury as follows:

"The plaintiff has no right to expect more profit on the powder sold than was derivable from the fair market value of its product during the years it was in business. It has no right to fix upon what
9467 Mr. Waddell deems a fair profit and claim compensation for the loss of that."

62. In instructing the jury as follows:

"In this case the statute of limitations pleaded by the defendant furnishes a line of demarkation between the two periods of the plaintiff's business. The 18th of September, 1905, fixes the dividing line and the plaintiff seeks to recover anticipated profits on the kegs of powder manufactured and sold for the three years since that date. The plaintiff claims that up to the 18th day of September, 1905, and covering a period of twenty-two months, it carried on its business profitably. The average profit per
9468 keg during such period, according to this claim, is 3 1-7 cents. This price per keg it figures from $6,470.61, which is the sum that the plaintiff claims its books show as the amount of the net profits made during the said twenty-two months and the number of kegs upon which the 3 1-7 cents per keg profit is based is 205,931. What I said to you concerning those books as evidence when dealing with the alleged cost of the plant is applicable here. It is only in case you find that these books have been so kept that you can ascertain therefrom with certainty that a profit was made during this period, and the amount of such profit, that you can use that profit as a basis for a comparison upon the question of profits during the subsequent period. If you can

not ascertain what were the actual profits by resorting to such books, of course, the inquiry as to profits at all fails for the lack of proof, and no allowance of profits can be made. If, on the contrary, however, it can be ascertained from such books with certainty that profits were made, and what was the amount of them, then the next question arises whether this period of twenty-two months was sufficiently long in view of the trade conditions prevailing, whatever may have been the cause thereof, to establish with reasonable certainty what the anticipated profits for the period subsequent to this 18th day of September, 1905, would have been if normal trade conditions had prevailed. Now, ac- 9470
cording to one contention, normal trade conditions did not obtain during this twenty-two months end ing with the eighteenth day of September, 1905, while according to another contention that the conditions prevailing during that period, as well as during the period following, were normal; and that they were just such conditions as would be likely to follow the abandonment of the Trade Association, which you know finally was dissolved in June, 1904. Whether they be normal or abnormal, if it be a fact that during that period the plaintiff made profits, they furnish a sufficient basis for comparison with subsequent years for me to submit it to your consideration; but it will be for you to say whether as a fact that period was sufficiently long to furnish a basis for comparison with subsequent 9471
years. If you should find that it isn't sufficient to furnish such a basis, even though you should have found that during the twenty-two months the plaintiff made a profit, the further inquiry as to profits during the remaining years must end, and no profits can be allowed. If, however, you find that it does furnish a satisfactory basis, then you will allow as profits upon the kegs manufactured during such subsequent period all or so much of such 3 1-7 cents per keg as you shall find was the profit per keg on the 224,683 kegs as is shown were made during the three years following September 18, 1905.

"The defendant challenges the correctness of the

9472 *Assignment of Error No. 63*

sum alleged to have been made as profits during the twenty-two months referred to, claiming that the items of salary paid to the Waddells, and the loss sustained in the explosions, one of which I considered a short time ago, when dealing with the question of the book value of the plant, should have been charged to the running or working expense during those twenty-two months, instead of to construction, and that if they had been this amount would have been totally wiped out. If that is the fact, of course, there is no standard here upon which you can calculate profit for the 224,683 kegs which were made and sold; but if you should find that
9473 only a part of such salaries and explosion losses, and which were charged to the construction account, should have been charged to running expense, and after deducting from this sum total, namely, $6,470.61, such amount so found, there remains a profit, that profit will furnish the standard; and when you have ascertained the price per keg such profit represents that will be the profit per keg, and not the 3 1-7 cents per keg that has been allowed as the anticipated profits upon the kegs actually sold."

63. In refusing to give to the jury the instruction requested by plaintiff in its seventeenth request:

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"Plaintiff claims damages on account of the loss of its business and good-will. You are instructed that good-will is the advantage of anything that is acquired beyond the mere value of the physical property, and, particularly, in consequence of the general public patronage and encouragement which the enterprise receives from constant or habitual customers or from other accidental circumstances. You are instructed that the value of the plaintiff's plant is not necessarily limited to what is actually invested in its physical properties, but in estimating the value of the plant you may consider its earning capacity; and the value of its good-will in valuing which you may take into consideration its earning capacity."

Assignment of Error No. 64 9475

64. In instructing the jury as follows:

"So far I have been dealing with the value of the plant simply as a tangible or physical property. A manufacturing plant, however, may have another and additional value, namely, its good-will; and as the plaintiff claims that it has suffered damages to its good-will, that phase will now be considered. Good-will may be defined for present purposes as 'the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein in consequence of the general public patronage and encouragement which it receives from constant or 9476
habitual customers on account of its local position, or from celebrity or reputation for skill, or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.' Establishment of a profitable business is the essential of the good-will. Where that does not exist there can be no good-will.

"The very contention of the plaintiff on another branch of the matter of damages is that from September 18, 1905, until the time that it ceased doing business, it was conducting an unprofitable business; and as the losses said to have been incurred during this period largely overcame the profits claimed to have been made for the twenty-two months preceding we have as the only basis for a 9477
good-will, not that a pecuniary advantage or benefit was secured by the plaintiff during the time it was in business, but that it would have done so except for the wrongful acts of the defendant, and that for a part of such time it actually did make a profit.

"True, a person may be wrongfully prevented from acquiring a good-will; and ethically such a wrong is just as injurious as if an established good-will was injured by such wrong doing. The rule in allowing as well as estimating damages, however, is a practical, rather than an ethical standard, and this excludes all damages that are purely speculative and contingent. To attempt to create out of unknown quantities a good-will for the purpose of giving it a value when no past conditions

9478 *Assignment of Errors Nos. 65-66*

establishing a good-will exist, would be but a pure speculation, and therefore not allowable. The claim of damages for good-will therefore must be disallowed."

65. In instructing the jury as follows:

"As the evidence does not furnish us with a legal basis upon which we can determine, as a matter of fact, that the plaintiff could have sold on a profitable basis any more powder than it actually sold, no allowance can be made for such unmade or unsold merchandise."

9479

66. In refusing to permit Edward L. Suffern, a witness for the plaintiff to answer the following question:

"Q. Assuming a manufacturing plant, constructed for the purpose of manufacturing black blasting powder, located near Edwards Station, about fourteen miles distant from Peoria, Illinois, said plant being located on the Chicago, Burlington and Quincy Railroad, the City of Peoria being served by twelve railroad companies, and said plant having secured from the railroad companies equal commodity rates with other manufacturers of black blasting powder, said plant being so located that
9480 shipments could be made to the Iowa, Missouri and Montana coal fields on an equal transportation basis with the Iowa mills, and assuming that the said plant was located in the center of the district where such powder was being consumed in increasing quantities from year to year in a district where there was a constant and increasing demand and assuming that said plant was constructed entirely new in the year 1903 and was kept in good repair and operation from the time of its construction up to September 19, 1908; and assuming that said plant was located on a tract of approximately 110 acres, which cost $5,450, and there had been expended in the construction of the buildings and machinery, including the cost of the real estate,

9481

$117,000; and assuming that there had been added betterments which brought up the cost of said plant, land and buildings to $129,000; and assuming that the machinery was of first-class construction and properly installed and in good order and condition; and assuming that said mills had a capacity of from 250,000 to 300,000 kegs per annum of black blasting powder, and that the Buckeye Powder Co., which operated said mills, had ample capacity, capital and facilities to manufacture conservatively 250,000 kegs of powder per year and that a fair and reasonable profit upon said powder, so manufactured, when sold, was the sum of .30 per keg. What, in your opinion, would you consider the reasonable and fair value of such a plant, business and good-will on September 19, 1908, operating under the conditions and in the manner above set forth?"

9482

67. In refusing to instruct the jury as requested by plaintiff in its fifteenth request as follows:

"You are instructed that it is your duty to ascertain and find the amount of actual damages which the plaintiff may have suffered. You have nothing to do with the matter of multiplication of such damages as required by the Seventh section of the Sherman Act. You are therefore instructed that you are not to be influenced in arriving at a determination of the amount of actual damages suffered by the plaintiff by the fact that such damages as you may return a verdict for are to be multiplied three-fold. The multiplication of the damages which may be returned by you as your verdict is a right which belongs to the plaintiff and is not to be abridged in any manner whatever."

9483

68. In refusing to grant plaintiff a new trial, for the reasons and causes therefor as shown by the plaintiff as follows:

"1. Because the verdict in favor of the E. I. du Pont Nemours Powder Company, returned herein on the 25th day of February, 1914, is against the clear weight of the evidence.

9484 *Assignment of Errors Nos. 68-69*

"2. Because the verdict for the Eastern Dynamite Co. and International Smokeless Powder and Chemical Co., returned herein on the 25th day of February, 1914, is against the clear weight of the evidence.

"3. Because said verdict rendered in favor of the E. I. du Pont Nemours Powder Company is against the law.

"4. Because said verdict in favor of the Eastern Dynamite Co. and International Smokeless Powder and Chemical Co. is against the law.

"5. Because the charge of the Court was erroneous in law.

9485 "6. Because of the failure of the Court to instruct the jury on material issues in its charge to the jury.

"7. Because of the refusal of the Court to instruct the jury on material issues as requested by the plaintiff in its charge to the jury.

"8. Because the jury while deliberating upon their verdict had before them a large number of letters, files, pleadings, and other papers that were not in evidence in said case and which they examined and inspected contrary to law."

69. In entering judgment against the plaintiff as follows:

"Judgment for defendants. Costs."

9486

WHEREFORE the plaintiff prays that said judgment may be reversed and the said Court be directed to grant a new trial of the issues in this action.

MACFARLAND, TAYLOR
& COSTELLO,
WILLARD U. TAYLOR,
TWYMAN O. ABBOTT,
WALTER J. BARTNETT,
Attorneys for Plaintiff,
Office & P. O. Address,
63 Wall Street,
Borough of Manhattan,
City of New York.

Notice of Motion to Extend Time for Hearing upon the Settlement of Bill of Exceptions. Filed Oct. 5, 1914. 9487

(Title of Court and Cause.)

To the above named plaintiff, and to MacFarland, Taylor and Costello, Willard U. Taylor, Twyman O. Abbott and Linton Satterthwaite, Esquires, Attorneys for Plaintiff:

Please take notice that the defendants in the above stated cause will apply to the Honorable John Rellstab, Judge of the above entitled court, 9488 on the fifth day of October, nineteen hundred and fourteen, at the Federal Building in Trenton, New Jersey, at the hour of ten-thirty o'clock of said day, or as soon thereafter as the matter may be heard, for an order extending the time for the hearing upon the settlement of the bill of exceptions in the above-entitled cause.

J. P. LAFFEY,
GEO. S. GRAHAM,
ROBT. H. McCARTER,
WM. H. BUTTON,
FRANK S. KATZENBACH, Jr.,
Attorneys for Defendants. 9489

Filed Oct. 5, 1914.

9490 **Petition for Writ of Error.**

UNITED STATES CIRCUIT COURT,

DISTRICT OF NEW JERSEY.

THE BUCKEYE POWDER COMPANY, a Corporation,
Plaintiff,

against

9491 E. I. DU PONT DE NEMOURS POWDER COMPANY (a Corporation of New Jersey), EASTERN DYNAMITE COMPANY (a Corporation of New Jersey), INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY (a Corporation of New Jersey),
Defendants.

To the Honorable Judges of the Circuit Court of Appeals of the Circuit Court of the United
9492 States for the Third Circuit:

Your petitioner, the Buckeye Powder Company, the plaintiff and appellant in the above entitled cause, respectfully represents and shows that in the above entitled cause pending in the United States District Court in and for the District of New Jersey, there was entered at the April term of said court, 1914, on the 20th day of April, 1914, a judgment against your petitioner; and your petitioner considers itself aggrieved by said judgment and represents that manifest error was committed, as set forth in the assignment of errors filed herewith, to the great injury of your petitioner.

9493

Wherefore your petitioner hereby appeals to the United States Circuit Court of Appeals for the Fourth Circuit of the United States, and prays that said appeal may be allowed, and that your petitioner have an opportunity to show the errors complained of, and that a transcript of the record and proceeding, orders and papers upon which said judgment is founded, may be sent to the said United States Circuit Court of Appeals for the Third Circuit as provided by law.

9494

Dated at Trenton, N. J., the fifth day of October, 1914.

BUCKEYE POWDER COMPANY,
By
MacFarland, Taylor & Costello,
Willard U. Taylor,
Twyman O. Abbott,
Walter J. Bartnett,
Its Attorneys.

Endorsed: Filed October 6, 1914.

GEORGE T. CRANMER,
Clerk.

9495

9496 **Stipulation. In Duplicate.**

IN THE DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF NEW JERSEY.

BUCKEYE POWDER COMPANY, a Corporation,
Plaintiff,

against

9497 E. I. DU PONT DE NEMOURS POWDER COMPANY, a Corporation, *et al.*,
Defendants.

} Action at Law.

It is hereby stipulated between counsel that the bill of exceptions in the above entitled cause may be settled and filed after the taking out and allowance of the writ of error, and that no objection will be made at any time by the defendants, or either of them, that the bill of exceptions has not been settled or filed before the date for taking an appeal
9498 has expired or before the date of allowance of writ of error herein, and that the bill of exceptions when settled may be signed and filed *nunc pro tunc* as of October fifth, nineteen hundred and fourteen.

And it is further agreed that the time for the defendants herein to propose amendments to said bill of exceptions is hereby extended to and including November fourth, nineteen hundred and fourteen.

It is also stipulated and agreed that the counsel for defendants will furnish the counsel for the plaintiff a copy of the defendants' record of the

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trial herein, for use in comparison of such amendments as may be proposed by the defendants.

MACFARLAND, TAYLOR & COSTELLO,
TWYMAN O. ABBOTT,
Attorneys and Counsel for Plaintiff.
WM. H. BUTTON,
FRANK S. KATZENBACH,
Attorneys and Counsel for Defendants.

Endorsed: Filed October 6, 1914.

GEORGE T. CRANMER,
Clerk.

9500

UNITED STATES CIRCUIT COURT,
DISTRICT OF NEW JERSEY.

THE BUCKEYE POWDER COMPANY, a Corporation,
Plaintiff,
against
E. I. DU PONT DE NEMOURS POWDER COMPANY (a Corporation of New Jersey), EASTERN DYNAMITE COMPANY (a Corporation of New Jersey), INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY (a Corporation of New Jersey),
Defendants.

9501

UNITED STATES OF AMERICA, ss.:

The President of the United States of America, To the Honorable Judges of the United States District Court for the District of New Jersey, Greeting:

Because, in the records and proceedings, as also

9502 *Writ of Error*

in the rendition of the judgment of a plea which is in the said District Court, before you, at the April Term, 1914, thereof, between Buckeye Powder Company, plaintiff, and E. I. du Pont de Nemours Powder Company (a corporation of New Jersey), Eastern Dynamite Company (a corporation of New Jersey), International Smokeless Powder and Chemical Company (a corporation of New Jersey), defendants, a manifest error hath happened, to the great damage of said Buckeye Powder Company, as by Buckeye Powder Company's
9503 complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Third Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of Philadelphia, and filed in the office of the clerk of the United States Circuit Court of Appeals, for the
9504 Third Circuit, on or before the fifth day of November, 1914, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 7th day of October, in the year of our Lord one thousand nine hundred and fourteen.

Bond for Damages and Costs 9505

Issued at the Clerk's Office in Trenton, New Jersey, with the seal of the
and dated as aforesaid.

GEORGE T .CRANMER,
[SEAL] Clerk of U. S. Dist. Ct. of N. J.
By Charles S. Chevrier,
Deputy.

Allowed by JOHN RELLSTAB, Judge.
Filed October 7, 1914.

GEORGE T. CRANMER,
Clerk.

9506

Bond for Damages and Costs.

UNITED STATES CIRCUIT COURT OF APPEALS—THIRD CIRCUIT.

BUCKEYE POWDER COMPANY,
Plaintiff-Appellant,
against

E. I. DU PONT DE NEMOURS POWDER COMPANY, EASTERN DYNAMITE COMPANY and INTERNATIONAL SMOKELESS POWDER & CHEMICAL COMPANY,
Defendants-Appellees. 9507

KNOW ALL MEN BY THESE PRESENTS, That the United States Fidelity and Guaranty Company, having an office and place of business at No. 47 Cedar Street, in the City of New York, County and State of New York, is held and firmly bound unto the above named E. I. du Pont de Nemours Powder Company, Eastern Dynamite Company and International Smokeless Powder & Chemical Company in the sum of Two hundred and fifty ($250.00) dollars, to be paid to the said E. I. du Pont de

9508 *Bond for Damages and Costs*

Nemours Powder Company, Eastern Dynamite Company and International Smokeless Powder & Chemical Company, for the payment of which, well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seal, and dated the 6th day of October, 1914.

Whereas, the above named Buckeye Powder Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit,
9509 to reverse the judgment dated the 20th day of April, 1914, rendered in the above entitled suit, in the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named Buckeye Powder Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

9510 By S. Frank Hedges,
Attorney-in-fact.

Attest: WILLIAM H. ESTWICK, Attorney-in-fact.

STATE AND COUNTY OF NEW YORK, ss.:

On this 6th day of October, 1914, before me personally came S. Frank Hedges, known to me to be the attorney-in-fact of the United States Fidelity and Guaranty Company, a corporation described in and which executed the annexed bond of the Buckeye Powder Company as surety thereon, who being by me duly sworn, deposes and says, that he resides in the City of New York, State of New York, and that he is the attorney-in-fact of the

said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Buckeye Powder Company is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as attorney-in-fact of said Company; and that he is acquainted with William H. Estwick and knows him to be the attorney-in-fact of said Company; and that the signature of said William H. Estwick subscribed to said bond is in the genuine handwriting of said William H. Estwick and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unincumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence this 23d day of September, 1914.

ALBERT J. ROWLAND,
Notary Public,
New York County No. 3318,
Register's No. 6115.

Certificate filed in King's Register's No. 6060; Bronx No. 10, Register's No. 632; Queens, Richmond, Westchester, Nassau, Putnam, Orange and Suffolk Counties. Term expires March 30, 1916.

9514 **Citation on Appeal.**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

THE BUCKEYE POWDER COMPANY, a Corporation,
Plaintiff,

against

9515 E. I. DU PONT DE NEMOURS POWDER COMPANY (a Corporation of New Jersey), EASTERN DYNAMITE COMPANY (a Corporation of New Jersey), INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY (a Corporation of New Jersey),
Defendants.

UNITED STATES OF AMERICA, ss.:

9516 To E. I. du Pont de Nemours Powder Company (a corporation of New Jersey), Eastern Dynamite Company (a corporation of New Jersey), International Smokeless Powder and Chemical Company (a corporation of New Jersey), GREETING:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Third Circuit, on the fifth day of November, 1914, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of New

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Jersey, wherein the Buckeye Powder Company is appellant, and the E. I. du Pont de Nemours Powder Company (a corporation of New Jersey), Eastern Dynamite Company (a corporation of New Jersey), International Smokeless Powder and Chemical Company (a corporation of New Jersey), are respondents, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not been done to the parties on that behalf.

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Given under my hand at Trenton, in the District of New Jersey, this 7th day of October, in the year of our Lord, One thousand nine hundred and fourteen.

JOHN RELLSTAB,
District Judge.

Service of the within citation upon last of the defendants therein named is hereby accepted on the 9th day of October, 1914.

FRANK S. KATZENBACH, JR.,
Atty. for Defendants, E. I. du Pont de Nemours Powder Co., Eastern Dynamite Powder Co., and International Smokeless Powder & Chemical Company.

9519

Filed October 14, 1914.

GEORGE T. CRANMER,
Clerk.

9520 **Order Extending Time for Filing Exceptions.**

IN THE DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF NEW JERSEY.

BUCKEYE POWDER COMPANY,
Plaintiff,

against

Action at Law.

9521 E. I. DU PONT DE NEMOURS POWDER COMPANY, *et al.*,
Defendants.

Application having been made on behalf of the plaintiff for an order extending the time for filing the bill of exceptions in the above stated cause;

It is, on this fourteenth day of October, nineteen hundred and fourteen, on motion of MacFarland, Taylor & Costello, of counsel for the plaintiff, ordered that the time for filing the bill of exceptions in said cause be extended to the twenty-third day
9522 of November, nineteen hundred and fourteen.

JOHN RELLSTAB,
Judge.

Filed October 14, 1914.

DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY. 9523

THE BUCKEYE POWDER COMPANY, a Corporation,
Plaintiff,

against

E. I. DU PONT DE NEMOURS POWDER COMPANY (a Corporation of New Jersey), and others,
Defendants. 9524

On motion of the plaintiff by its attorneys, MacFarland, Taylor & Costello and Twyman O. Abbott for an order extending the time within which the appellant shall file the record with the Clerk of the United States Circuit Court of Appeals for the Third Circuit, on the writ of error heretofore allowed to the said Circuit Court of Appeals from the judgment entered in the above entitled action on the 20th day of April, 1914, and for good cause shown therefor, the Court being advised, it is hereby 9525

ORDERED that the time for the filing of said record with the said Clerk of the said Circuit Court of Appeals be and the same is hereby extended to the 4th day of February, 1915.

JOHN BELLSTAB,
United States District Judge.

Filed Nov. 4, 1914.
GEORGE T. CRANMER,
Clerk.

9526 DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

THE BUCKEYE POWDER COMPANY, a Corporation,
Plaintiff,

against

E. I. DU PONT DE NEMOURS POWDER COMPANY (a Corporation of New Jersey), and others,
9527 Defendants.

On the 9th day of November, 1914, the application of the above entitled defendants for an extension of time within which to prepare and serve proposed amendments to the proposed bill of exceptions, having come on to be heard before me, and it appearing that heretofore, to wit, on the 4th day of October, 1914, the said defendants served a notice application of the above named defendants for an extension of time within which to prepare and serve proposed amendments to proposed bill of exceptions, and the court having granted an extension for such purpose to the 4th day of November, 1914, and it further appearing that on the 30th day of Octoboer, 1914, the said defendants served a notice on the plaintiff's counsel that application would be made on the 9th day of November, 1914, for a further extension of time, and the plaintiff being represented by its counsel, Twyman O. Abbott, and the defendants by their counsel, William H. Button and Frank S. Katzenbach, and the court having heard the argument of counsel, and being advised, it is

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ORDERED, that the time within which the defend-

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ants may prepare and serve proposed amendments to the proposed bill of exceptions filed herein, be and the same is hereby extended to the 9th day of December, 1914.

JOHN RELLSTAB,
District Judge.

Filed November 9, 1914.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW JERSEY.

9530

BUCKEYE POWDER COMPANY,
Plaintiff,

against

E. I. DU PONT DE NEMOURS POWDER COMPANY, *et al.*,
Defendants.

} Notice.

To the above named defendants and to their attorneys, William H. Button and Frank J. Katzenbach, Jr.:

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YOU WILL PLEASE TAKE NOTICE that the above named plaintiff will apply to the Honorable John Rellstab, Judge of the above entitled Court, on Monday, the 14th day of December, 1914, for the settlement of the proposed bill of exceptions heretofore filed herein.

MACFARLAND, TAYLOR & COSTELLO,
TWYMAN O. ABBOTT,
Attorneys for Plaintiff.

Endorsed:
Filed December 12, 1914.
GEORGE T. CRANMER, Clerk.

9532 UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW JERSEY.

BUCKEYE POWDER COMPANY,
Plaintiff,

against

E. I. DU PONT DE NEMOURS POWDER COMPANY, *et al.*,
Defendants.

} Order.

9533 The above matter having come on to be heard this day before me at Trenton, for settlement of the bill of exceptions of the plaintiff upon the writ of error from the judgment entered herein on the 20th day of April, 1914, to the Circuit Court of Appeals for the Third Judicial Circuit of the United States, and the plaintiff being represented by its counsel, Twyman O. Abbott, and the defendant by its counsel, William H. Button and Frank S. Katzenbach, Jr., and it appearing to the Court that the testimony taken in said action at the trial thereof is so voluminous and involves so many questions, that it
9534 is impracticable to give the testimony of said witnesses in narrative form in said bill of exceptions, and that in order to present the issues upon said writ of error clearly it is necessary to give the testimony of said witnesses by question and answer;

Now, therefore, upon the application of the plaintiff, by its said attorney, for an order allowing the plaintiff to file its bill of exceptions by giving the testimony of the witnesses as taken at the trial thereof, by question and answer instead of in narrative form; and it appearing that the defendants, by their said attorneys, have agreed and consented thereto, it is hereby

Order 9535

ORDERED that the plaintiff is hereby authorized and permitted to prepare, serve and file its bill of exceptions upon the writ of error sued out herein, by question and answer and not in narrative form.

Dated at Trenton, this 13th day of January, 1915.

JOHN RELLSTAB,
District Judge.

Jan. 13, 1914.

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No objection and we consent to the above order.

WM. H. BUTTON,
FRANK S. KATZENBACH,
Attorneys for Defendants.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS, 9538

FOR THE THIRD DISTRICT.

BUCKEYE POWDER COMPANY,
Plaintiff in Error,

vs.

E. I. DU PONT DE NEMOURS POWDER COMPANY, *et al.*,
Defendants in Error.

No. 1899.
March Term,
1915.

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And afterwards, to wit, on the twenty-second and twenty-third days of April, 1915, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs before the Hon. Joseph Buffington, Hon. John B. McPherson, and Hon. Victor B. Woolley, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the second day of July, 1915, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision: 9540

9541 IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

BUCKEYE POWDER COMPANY, Plaintiff Below, vs. E. I. DU PONT DE NEMOURS POWDER COMPANY, *et al.*,	No. 1899. March Term, 1915.

9542 Error to the District Court of the United States for the District of New Jersey.

Before BUFFINGTON, MCPHERSON, and WOOLLEY, Circuit Judge.

MCPHERSON, Circuit Judge:

In this action at law, which is brought under §7 of the Anti-Trust Act of 1890, the Buckeye Powder Company, an Ohio corporation, is the plaintiff, and three New Jersey corporations are defendants —the E. I. du Pont de Nemours Powder Company, the Eastern Dynamite Company, and the International Smokeless Powder and Chemical Company.

9543 In essence the declaration charged that the plaintiff's business— the manufacture of black blasting powder—had been greatly injured and finally destroyed by the defendant's unlawful conduct in violation of sections 1 and 2 of the Act. Treble damages were asked for amounting to nearly $4,000,000—altho this demand was much reduced at the end of the trial—and the dispute occupied the time of a court and jury during nearly all the working days between September 24, 1913, and February 25 of the following year. The case was submitted

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in a comprehensive charged marked by great ability and painstaking care, and the jury returned a verdict of "no cause of action as to all the defendants." So far as the Dynamite Company and the International Company are concerned, this was a directed verdict, the trial judge holding that the evidence did not establish their participation in any unlawful act; but the liability of the Du Pont Company was submitted to the jury and was passed on by that tribunal. Nearly 70 errors are assigned on the pending writ, but 20 of them are not pressed, and some that relate to the measure of damages 9545
are not now important. Those that still need attention can be considered more satisfactorily by taking up the subjects to which they relate than by taking them up seriatim. A short preliminary statement may be desirable in order to explain some of the questions that were presented to the court and jury.

First, the relevant dates. The Buckeye Company was incorporated in January, 1903; it began business the following September and abandoned the field 5 years later in September, 1908. The Du Pont Company was incorporated in May, 1903, succeeding a number of earlier enterprises; the 9546
other defendants are older, the Eastern Dynamite Company going back to 1895, and the International Company to some date we have not found in the record, but apparently several years at least before 1903. The defendants admitted their participation in an illegal trade association as late as June 30, 1904, but denied that such participation continued thereafter. In June, 1911, the three defendants in company with 25 other corporations and individuals, were adjudged to have violated the Anti-Trust Act: *U. S. v. Du Pont Company* (C. C., 3d Circ.), 188 Fed., 127. But, as the government's

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object in that suit was merely to dissolve an unlawful combination, we need hardly say that under the long established rules of evidence that were in force until a few months ago the Buckeye Company—a stranger to that proceeding—could not avail itself in the present suit either of the evidence then given, or of the decree. It is true that these rules have since been changed by §5 of the Act of October 15, 1914, which provides that:

> "A final judgment or decree *hereafter* rendered * * * in any suit or proceeding in equity
9548 brought by or on behalf of the United States under the anti-trust laws, to the effect that a defendant has violated said laws, shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."

But, as this statute had not been passed when the trial took place, and moreover as the express terms of the section confine it to future judgments or decrees, the Buckeye Company was obliged to offer evidence to prove the affirmative
9549 of the issues in the present suit: (1) that the defendants had violated the Anti-Trust Act, and (2) that by such violation they had so injured the plaintiff that damages should be awarded. Voluminous evidence on these issues in many of their aspects was offered by both parties, and the verdict has settled numerous questions of fact in favor of the defendants.

We need not dwell upon the point that we have no power to determine (as we are asked to do) whether the verdict was in accord with the weight of the evidence, or to review the finding of the

jury on any disputed fact; our only business is to inquire whether the assignments of error that were properly taken disclose any material mistake in the trial. For this reason much of the plaintiff's argument must be laid aside as irrelevant; indeed, the brief contains so much that is nothing more than a conscious or unconscious attack on the verdict, that we have not always found it easy to disentangle the questions of law that lie within our province from the questions of fact that lie outside. 9550

In a few words, the situation below was this: The plaintiff charged, and attempted to prove; That an unlawful and extensive combination in several forms had existed for more than 30 years, the object of the evidence being to establish the fact that a more or less complete monopoly had been created of the trade in powder (especially in black blasting powder) and other explosives; that this attempted monopoly and consequent restraint of trade had been substantially successful, and was maintained from January, 1903, to the end of 1908, the whole period covered by the suit; that R. S. Waddell, a man with large experience in the trade, who had been employed by the defendants for more than 20 years, had undertaken to organize the plaintiff corporation for the purpose of making and selling black blasting powder; that the defendants thereupon began to interfere with his project in various unlawful ways; and that these attempts to injure the business continued after the Buckeye Company had been incorporated and after its plants had been built near Peoria, Illinois. Charges of oppressive conduct were set forth in great detail, some of such acts being directed specifically against the plaintiff, and other acts being directed against the plaintiff in company 9551 9552

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with other of the defendants' rivals. As a result the Buckeye Company alleged that its enterprise suffered injury from the beginning, and was finally sold out and abandoned at a serious loss.

The defendants denied these charges, and the plaintiff (having the burden of proof) undertook to prove some of them, but by no means all. Much conflicting evidence was taken, filling a record of several thousand pages. Among other matters the defendants contended that they had done nothing to bring about any abnormal conditions in the
9554 trade, and if the plaintiff had suffered loss from such conditions its misfortune should not be laid at their door. On the contrary, they insisted that the plaintiff's troubles were due to its own faults or blunders, such as improper organization, lack of capital, insufficient experience, inattention to business, misrepresentations to customers, inability to fill orders, and furnishing bad powder. A great deal of the record is devoted to this branch of the dispute, and many witnesses testified that the defendants did not interfere with the plaintiff's customers, or entice them away; when they left, it was because the plaintiff had not satisfied them.
9555 To refute the charge that the defendants had oppressively and illegally lowered prices, evidence was offered that during the period in question there was much independent competition, led by the plaintiff itself, and that this competition was the prevailing, if not the sole, factor in lowering prices. There was also evidence that the Du Pont Company's hold on the trade, and the volume of its business, continually diminished during the whole period of the suit.

Two distinct defenses were therefore set up: (1) a denial that the Anti-Trust Act had been violated by the defendants after June 30, 1904, and (2) an

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assertion that even if such violation had taken place the plaintiff had suffered no injury therefrom, but had met with loss and final failure because its equipment had not been adequate, and its management had not been competent. Each defense raised numerous questions of fact, and, as the verdict in favor of the Du Pont Company may have been founded as well upon one defense as upon the other, the legal rulings that are relevant to either defense are open to the plaintiff's attack. Let us turn to such of the legal questions as we think it necessary to notice.

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1. In our opinion, the direction to find a verdict in favor of the Dynamite Company and of the International Company was correct. Neither of these corporations manufactured or traded in black blasting powder—which was the particular business the defendants were charged with restraining or monopolizing—and their indirect connection with the alleged unlawful combination was rested almost wholly on the fact that a majority of the stock in each was owned or controlled by the Du Pont Company. Obviously, however, this fact alone did not prove their participation in a conspiracy, and as there was almost nothing else to support the allegation we need not take further time to discuss it. Moreover, only selected portions of the evidence are before us, and the district judge very properly called attention to this fact when he granted the exception now being considered, saying: "In my judgment this exception to be considered should have behind it the entire record, but it is allowed and signed that the plaintiff may have the benefit of it in case I am in error in that view."

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2. The plaintiff complains also, because the trial judge required it to elect whether it would in-

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sist before the jury on a violation of §1 of the Anti-Trust Act, or on a violation of §2. Manifestly the correctness of this ruling also can only be satisfactorily reviewed upon the whole record, and what we have just said applies to this assignment as well.

Moreover, we may take note of the fact that this subject had evidently been a source of contention from the beginning of the suit, as will appear from Judge Rellstab's opinion in 196 Fed., 514, where the original declaration is printed. The question of duplicity was thus raised at an early stage, and
9560 as a result of that decision an amended declaration was afterwards filed. But this also contained only one count, and, as Judge Lanning (sitting in the Circuit Court for the District of New Jersey) had already decided in *Rice* v. *Standard Oil Co.*, 134 Fed., 464, that a declaration in a similar suit under the same section was bad for duplicity because it combined two causes of action in one count, we think the trial judge was sufficiently justified in requiring the plaintiff to elect. But in any event we do not see how the ruling could have done harm; if the declaration did not support alternative charges, and if such charges were regarded as im-
9561 portant to the case, the easy remedy by amendment was at hand. It is not surprising, however, that the plaintiff did not ask to amend; for we cannot conceive it possible that any one could doubt, at the end of this five months' trial, that the plaintiff's case depended for success upon the truth of the charge (to which practically all the evidence was directed) that the defendants had unlawfully attempted to monopolize a large part of the trade in black powder. The case was certainly tried on the merits, and the ruling complained of was harmless, even if it were formally erroneous.

3. If we are to understand that the plaintiff is

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seriously insisting that the court erred in refusing leave to offer the decrees in evidence that were entered in the government's suit (188 Fed., 127), we shall only say in reply that we are not aware of any rule of evidence in force at the time of the trial that would have warranted the court in making a different decision. The parties in the two suits were different, the subject-matter was different; and the trial judge's ruling is so fully justified by the well-established law then existing that no supporting authority need be cited.

4. Some of the assignments are not the subject 9563
of a proper exception. At the close of the evidence the plaintiff submitted a series of 27 requests for instruction, and the trial judge did not answer them specifically, believing that he had substantially answered them in his general instructions, as, of course, he had a right to do. This is evident from what he said at the end of the charge:

> "As to the plaintiff's requests, as I recall it, I have touched upon every one of these requests, and I therefore will not charge them in the language requested, but counsel may take an exception, of course, to the fact that I do not specifically charge in the precise language re- 9564
> quested."

This of course invited counsel to point out which instructions, if any, they did not regard as sufficiently answered in the general charge. Many decisions declare that fairness to the court requires this to be done; but the plaintiff's counsel, instead of specifying errors or omissions or insufficient answers, asked for an exception in the most general language possible: "We also except to that portion of your Honor's charge which refuses to give our instructions except as charged." The Supreme Court has several times decided that such an ex-

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ception does not call the court's attention properly to what is objected to, and is therefore insufficient: *Beaver* v. *Taylor,* 93 U. S., 55; *Upton* v. *McLaughlin,* 105 U. S., 646; *Jones* v. *Railroad,* 157 U. S., 682; *Thiede* v. *Utah,* 159 U. S., 521. And, as the fourth request of the series is not sound, the action of the trial judge is also supported by *Moulor* v. *Insurance Co.,* 111 U. S., 337, and *Bogk* v. *Gassert,* 149 U. S., 26.

5. The plaintiff also complains of certain parts of the charge as erroneous on the ground that the
9566 court's language was:

"* * * tantamount to saying that monopoly needs but to obtain a foothold, and thereafter competitors must enter the field at their peril. It was a virtual direction of a verdict for the defendants, because it was equivalent to saying that long continued violation of the law may ripen into privilege and may become a vested right. It is a most dangerous doctrine that monopoly can gain the right to perpetuate itself by prescription; that one who may venture into the field occupied by it must do so at his peril, and if he does so with knowledge of its existence, can claim no protection from its unlawful methods."

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It is almost needless to say that the instructions of the learned Judge carry no such meaning, and could have had no such effect. After a preliminary statement outlining the previous history of the powder trade, he told the jury distinctly that:

"The defendant (the Du Pont Powder Company), therefore, at the time of the organization of the plaintiff company * * * and during the entire time the plaintiff carried on its business, was acting in violation of the Anti-Trust Act as attempting to monopolize the trade in powder, which subjected it to be dissolved as such

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by direct attack on the part of the United States Government."

He added, however, the qualification that was called for by the nature of the case on trial:

"The fact that the status of the defendant was such, however, that under a direct attack by the Government it would be dissolved as an unlawful combination in restraint of trade and an attempt to monopolize, would not alone make it liable in an action for damages. Such a suit can be maintained only for injuries sustained by reason of such attempted monopolization, so that 9569
in a suit for damages the defendant is entitled to more defenses than would be available in a suit brought by the Government for dissolution, and the plaintiff in such a suit has more to prove than is necessary to obtain a decree in the Government suit. It becomes important, therefore, to inquire into the relationship which the defendant bore to the powder trade generally at the time when the plaintiff asserts its promoter first declared his intent to engage in the powder business, and its subsequent relationship toward such trade generally, and to the plaintiff in particular, during the years 1903 to 1908, within which period the plaintiff claims it was being injured by reason of the acts of the defendant, and which it alleges were unlawful and 9570
within the operation of the Anti-Trust Act, as attempts to monopolize the powder trade."

He then summarized the foregoing paragraph, repeating that the *mere fact* that the defendant owed much of its growth and power in the trade to unlawful acts in the past, and that it continued to enjoy the fruits of some of such unlawful acts, did not make it liable in damages. Then follows immediately one of the passages attacked in the words already quoted from the plaintiff's brief:

"This suit is unique in many respects. The

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plaintiff, as a corporation and as a competitor in the powder business, is due to the efforts of R. S. Waddell, its chief witness in the suit. He organized it shortly after he separated himself from his employment with the defendant, with which and its predecessors he had been identified for about twenty years. His services, while in the employment of the Du Pont interests, brought him in touch with their business policies and operations in the vending of powder. He knew of the existence of the trade associations, and of such of the restraints and limitations put upon its members as related to the apportion-
9572 ment of the trade and the fixing of prices. The comparative size of the defendant's capacity for output in relation to other powder manufacturers, and its influence as a factor in the trade generally, were known to him when he severed his connection, and when he conceived and began to carry out his purpose of entering into such powder field as a competitor. The plaintiff does not occupy the same position as a competitor in existence during the period that this influence was being developed, and who may have been, during the course of such development, as well as after it had reached the height of its power, injured in its business or property by reason thereof, but is here as one entering the competitive field when such growth and influence have
9573 been established. To it (the plaintiff) this influence and power of the defendant when it, the plaintiff, was launched into the powder field, is not *in itself* actionable, even though that status is due in part to methods which are prohibited by the Anti-Trust Act; and before the plaintiff can recover it must establish that the defendant used its power in the trade oppressively, not necessarily against the plaintiff alone, but at least in the conduct of its business generally; that is, that it used such methods as, backed by its influential position, tended to the suppression of open competition and to obstruct the free flow of commerce—the trade conditions sought to be secured and protected by the prohibitions

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of the Anti-Trust Act—and that is, the plaintiff, was injured by reason thereof."

We confess our inability to see anything objectionable in this language. It states nothing but indisputable facts, and does not take on a harmful character even when it is bracketed with the second passage complained of. This is taken out of its place in another portion of the charge, where the learned judge was dealing with a wholly different subject, namely, with the question whether the plaintiff had been properly equipped and capitalized—this matter having a direct bearing on 9575
the defendants' allegation, that the Buckeye enterprise was organized merely to be sold out, and was not intended to be a *bona fide* factory at all:

"Mr. Waddell, as already stated, was well advised, when he promoted the plaintiff company, of the defendant's business, capacity and policies. He had been its agent for a long period during which several severe competitive struggles took place, and he knew the outcome thereof, and which was, generally speaking, the taking over in one form or another of such newcomers, and at least in one instance—that of the Indiana—at a considerable profit to the owners of that company. Of course, Mr. Waddell, or the 9576
company which he formed, had a right to go into business, and the motive for entering into such business is of little moment, so far as their rights were concerned; but if he was actuated by the belief that his company would meet with a like experience after some competitive struggles, it may have a bearing upon the question whether the plaintiff was sufficiently capitalized to engage in the struggle for the market already occupied. Of course, if you find that it was sufficiently capitalized, or that it had sufficient financial backing to weather a struggle carried on under normal or lawful competitive conditions, that is a sufficient answer, and it would make

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no difference whether it was or was not sufficiently capitalized to meet a competition forced upon it by unlawful means."

Certainly, as we think, no sound criticism can be made of these passages, either taken singly or placed side by side, and we shall make no further comment upon them.

6. With one exception, we do not think it necessary to take up separately any other subject embraced in the assignments of error. They have all been examined and considered, and in our opinion
9578 none of the rulings and instructions complained of could have been materially harmful, even if a minute scrutiny might disclose an occasional lapse from an ideal standard. No record could come unscathed thru such an ordeal after a five months' trial, and it is greatly to the credit of the district judge that so little of importance is now urged for reversal. Many of the assignments seem to be of very slight importance, indeed, and may be passed without discussion.

7. The only subject that may need a few words of separate consideration is the refusal to grant a new trial. The principal ground of complaint
9579 pressed upon us is the fact that while the jury were deliberating on their verdict they had in their possession two papers whose contents are said to have been of such a nature as to influence them improperly. This matter, however, has already been heard and decided by the district court, and we find nothing in the record to make the present situation exceptional. The facts are these: After the verdict was rendered a motion for a new trial was made and entertained. It assigned the usual general and formal reasons—that the verdict was against the law and against the weight of the evidence, and that the charge was erroneous both

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in what it said and in what it failed to say—and then added a special reason to the effect that the jury had had before it certain letters and other papers that were not in evidence. Manifestly, this reason required the taking of testimony, and accordingly a number of witnesses were examined. On April 10 the motion was fully argued before the court, and was refused after what was evidently a thorough consideration. The rule in the federal courts being well settled that such a refusal is a matter of discretion that will not be reviewer except for abuse, we shall only add that we 9581
have read and considered everything contained in the record on this subject and can see no sufficient ground for interfering with what was done by the court below. Indeed, we incline to think that the subject may perhaps have been brought before us under a misapprehension, for it was argued as if the district judge had refused to hear and entertain the motion at all except upon the special reason referred to above, altho (as we understand the record) the facts do not support such a position. On the contrary, the motion was made and was promptly entertained, the court made an order for the taking of testimony, wit-
nesses were examined, argument was heard, and 9582
on April 10 the whole subject was disposed of by an order discharging the rule that had been granted and refusing the motion. We see nothing reviewable in such a proceeding.

On the whole case we are of opinion that the plaintiff had a fair and patient trial, and that whatever complaint he may have should be directed to the verdict rather than the action of the court.

The judgment is affirmed.

Endorsed: No. 1899.

Opinion of the Court by McPherson, J.

Received and filed July 2, 1915.

SAUNDERS LEWIS, JR., Clerk.

9583 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

BUCKEYE POWDER COMPANY,
Plaintiff in Error,

vs.

E. I. DU PONT DE NEMOURS POWDER COMPANY, *et al.*,
Defendants in Error.

No. 1899.
March Term,
1915.

9584

In Error to the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs.

9585 (Signed) JOHN B. McPHERSON,
Philadelphia, Circuit Judge.

July 2, 1915.
Endorsed:
No. 1899.

Order Affirming Judgment, Received and Filed, July 2, 1915.

SAUNDERS LEWIS, JR.,
Clerk.

9586

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

THE BUCKEYE POWDER COMPANY, a Corporation,
Plaintiff in Error,

against

E. I. DU PONT DE NEMOURS POWDER COMPANY (a Corporation of New Jersey), EASTERN DYNAMITE COMPANY (a Corporation of New Jersey), INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY (a Corporation of New Jersey),
Defendants in Error.

9587

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

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Your petitioner, the Buckeye Powder Company, plaintiff in error in the above entitled case respectfully represents and shows that in the above entitled case pending in the United States Circuit Court of Appeals for the Third Circuit, a judgment was entered at the March term of said Court, 1915, on the Second day of July, 1915, against your petitioner affirming a judgment entered in the United States District Court in and for the District of New Jersey, on the 20th day of April, 1914, at the April Term of said Court, 1914; and your petitioner

9589 considers itself aggrieved by said judgment, and represents that manifest error was committed as set forth in the assignment of errors filed herewith, to the great injury of your petitioner.

Wherefore your petitioner prays that it have an opportunity to show the errors complained of in the Supreme Court of the United States, and that a transcript of the record and proceedings, orders and papers upon which said judgment is founded may be sent to the said Supreme Court of the United States as provided by law.

9590 Dated at Philadelphia the 2d day of September, 1915.

BUCKEYE POWDER COMPANY,
Petitioner.

TWYMAN O. ABBOTT,
WILLARD U. TAYLOR,
WALTER J. BARTNETT,
Attorneys for Petitioner.

Allowed,
(Signed) JOHN B. MCPHERSON,
Judge.

9591 Endorsed:
No. 1899.

Petition for Writ of Error, Received and Filed, Sept. 2, 1915.

SAUNDERS LEWIS, Jr.,
Clerk.

9592

Assignment of Errors.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

THE BUCKEYE POWDER COMPANY (a Corporation), Plaintiff in Error,

9593

against

E. I. DU PONT DE NEMOURS POWDER COMPANY (a corporation of New Jersey), EASTERN DYNAMITE COMPANY (a corporation of New Jersey), INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY (a corporation of New Jersey), Defendant in Error.

Assignment of Errors.

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Now comes the Buckeye Powder Company, plaintiff in error, and makes and files this, its Assignments of Error:

The United States Circuit Court of Appeals for the Third Circuit erred—

1. In refusing to set aside the judgment of the United States District Court for the District of New Jersey entered against plaintiff in error, in

9595 *Assignment of Errors 2-3-4-5*

the above entitled cause, on the 20th day of April, 1914, at the April Term of said Court, 1914.

2. In affirming the judgment of the District Court of the United States for the District of New Jersey, entered against plaintiff in error on the 20th day of April, 1914, at the April Term of said Court, 1914.

3. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

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"The suit is brought by the Buckeye Powder Company and has proceeded to trial against three defendants. The evidence, however, fails to support any participation by the Eastern Dynamite Company and the International Smokeless Powder and Chemical Company, and my instructions to you are that you return a verdict of no cause of action in their favor."

4. In refusing to correct the error of the District Court in making an order requiring the plaintiff in error to make an election whether under its declaration it would rely upon the first or second sections of the Act of Congress of July 2, 1890, commonly known as the Sherman Act.

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5. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

"This suit is unique in many respects. The plaintiff, as a corporation and as a competitor in the powder business, is due to the efforts of R. S. Waddell, its chief witness in the suit. He organized it shortly after he separated himself from his employment with the defendant with which and its predecessors he had been identified

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for about twenty years. His services, while in the employment of the Du Pont interests brought him in touch with their business policies and operations in the vending of powder. He knew of the existence of the trade associations and of such of the restraints and limitations put upon its members as related to the apportionment of the trade and the fixing of prices. The comparative size of the defendant's capacity for output in relation to other powder manufacturers, and its influence as a factor in the trade generally, were known to him when he severed his connection and when he conceived and began to carry out his purpose of entering into such powder 9599
field as a competitor. The plaintiff does not occupy the same position as a competitor in existence during the period that this influence was being developed and who may have been, during the course of such development, as well as after it had reached the height of its power, injured in its business or property by reason thereof, but is here as one entering the competitive field when such growth and influence have been established. To it, this influence and power of the defendant, when it, the plaintiff, was launched into the powder field, is not in itself actionable, even though that status is due in part to methods which are prohibited by the Anti-Trust Act, and before the plaintiff can recover it must establish that the defendant used its power 9600
in the trade oppressively, not necessarily against the plaintiff alone; but at least in the conduct of its business generally; that is, that it used such methods as, backed by its influential position, tended to the suppression of open competition and to obstruct the free flow of commerce—the trade conditions sought to be secured and protected by the prohibitions of the Anti-Trust Act, and that it, the plaintiff, was injured by reason thereof."

6. In refusing to correct the error of the Dis-

9601 trict Court in instructing the jury as follows, to wit:

"Mr. Waddell, as already stated, was well advised when he promoted the plaintiff company of the defendant's business, capacity and policies. He had been its agent for a long period during which several severe competitive struggles took place, and he knew the outcome thereof, and which was, generally speaking, the taking over in one form and another of such new comers, and at least in one instance—that of the Indiana at a considerable profit to the owners of that company.

9602 "Of course, Mr. Waddell, or the company which he formed had a right to go into business, and the motive for entering into such business is of little moment so far as their rights were concerned; but if he was actuated by the belief that his company would meet with a like experience after some competitive struggles, it may have a bearing upon the question whether the plaintiff was sufficiently capitalized to engage in the struggle for the market already occupied. Of course, if you find that it was sufficiently capitalized, or that it had sufficient financial backing to weather a struggle carried on under normal or lawful competitive conditions, that is a sufficient answer, and it would make no differ-

9603 ence whether it was or was not sufficiently capitalized to meet a competition forced upon it by unlawful means."

7. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

"No one who enters into a competitive field is guaranteed that he will get any particular share or even a share of the business at a profit, nor does the mere fact that the largest competitor is able to prevent a smaller one from getting a profitable share of the business make it liable

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in damages to such other. Competition, as it exists under the laws at this date, has within it the element of fight. It permits fighting so long as it is fair and it permits the fair fighter to go away with the spoils, even though some one in that fight has been injured, and perhaps irretrievably injured in consequence; so that it is not the mere fact that a competitor suffers injury through severe competition that makes the other competitor who may have come out of the fray successfully, liable to compensate for the losses sustained by the injured party."

8. In refusing to correct the error of the District Court in instructing the jury as follows, to wit: 9605

"There is no evidence whatever which would justify you in finding that the defendant hired detectives to track Mr. Waddell for the purpose of forestalling him in the purchase of a site, and to create opposition among the people to the location of plaintiff's plant in any place by instilling fear or otherwise, or by bidding up the price of any property plaintiff might have desired to acquire so as to prevent the entry of a competitor into the black powder business. The fact, however, that detectives were employed by the defendant to shadow Mr. Waddell after he had severed his connection with the defendant, and 9606
after his declaration to embark in a competitive business, is a circumstance to be considered by you in connection with the other testimony in the case upon the alternative questions whether it shows a hostile purpose upon the part of the defendant against Mr. Waddell's contemplated enterprise with the view of suppressing competition, or whether it was but a step taken by the defendant in the protection of its legitimate interests, namely, to prevent their employees from being taken from them by this prospective competitor, which latter is the explanation offered on behalf of the defendants."

9607 *Assignment of Errors 9-10*

9. In refusing to correct the error of the District Court in refusing to receive in evidence a letter offered by the plaintiff, reading as follows:

"Chicago, Feb. 13, 1903.

H. A. Koach, Esq.,
c/o Stratford Hotel,
Cincinnati, Ohio:

Dear Sir—This will be handed to you by Capt. H. R. Saville of the Philadelphia Agency, who has been engaged in shadowing the party I wired
9608 to you about in cipher, as follows:

'Wire immediately if R. S. Waddell of Wilmington, Delaware, is now in Cincinnati; think can be found South East corner Third and Broadway. Want to place shadow; therefore, inquire carefully.'

and to which you replied as follows:

'Mail at party's office Union Trust Building indicates he will arrive tomorrow. He has home and family in this city.'

Will you kindly assist him as much as possible in locating the party, and just as soon as he locates him, he is to wire to Chicago for assistance.

Yours truly,

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(Signed) J. H. Schumacher,
Sup't."

10. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

"There is no evidence to the effect that the defendants or any of them exercised any control at any time over the affairs of the Equitable Powder Company or the Austin Powder Company by virtue of any stock that they have held in those corporations, and therefore you must not

consider any claim to the effect that they had exercised such control."

11. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

"There is no evidence showing that any of the defendants knew or had anything whatever to do with the purchase of the Buckeye Powder Plant and property by Mr. Olin and his associates, and therefore you must not consider the fact of such purchase as tending to establish any combination or conspiracy or other conduct pro- 9611
hibited by the Sherman Act."

12. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

"There is no evidence, gentlemen, that would sustain the allegations made by the plaintiff, that * * * cash, intoxicating liquors, household goods and clothing were distributed among miners to secure their influence with their fellow workmen to effect boycotts, * * * or that it (the defendant) sold its product below actual cost; * * * and my instructions to you are, as to these particular allegations, that they have not 9612
been established, and you will therefore disregard them entirely in your further consideration of the issue here being tried."

13. In refusing to correct the error of the District Court in instructing the jury that at a test which was ordered by the Miners' Union to be made of the relative merits of the powder manufactured by plaintiff in error, and that manufactured by defendants in error at the mines of Applegate & Lewis at Hanna City, Illinois, "while this test was going on each of the powders had a paid

9613 representative among the working miners, one acting in the interest of the plaintiff's powder, and the other in the interest of the defendant's."

14. In refusing to correct the error of the District Court in refusing to permit R. S. Waddell, a witness for the plaintiff, while on direct examination, to state what it was that caused him, as president of the plaintiff, to make an investigation for the purpose of ascertaining how it was that advices were received by him from persons to whom con-
9614 signments of black blasting powder had been shipped from the shipment office of the Buckeye Powder Company—giving the definite car number of the car in which shipment was made and all the details of the shipment—before notice of that shipment had been received at the business office of that company.

15. In refusing to correct the error of the District Court in refusing to permit John G. Miller, a witness for the plaintiff, while on direct examination, to answer the following question—he having already been permitted to testify that he called the attention of the Burlington Railway
9615 Company officials to the situation relative to information concerning the shipments made by Buckeye Powder Company to its customers coming to him from sources other than the Buckeye Powder Company, and that said officials made an investigation:

"Q. Now, do you know what the result of that investigation was?"

16. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

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"As to the charge that the defendant employed railroad employees to make telegraphic reports or other kind of reports of the plaintiff's shipments, and which information was used to get consignees to reject plaintiff's shipments, there is no proof that the defendant was able to have the consignments of plaintiff's powder cancelled by reason of any information obtained from railroad employees concerning such consignments, or that they ever succeeded in geeting such information from such employees, but there is evidence in the case that one named Piatt, who was an agent of the defendant, sought to hire Harry Paige, commercial agent of the C. B. & Q. Railway, to give him (Piatt) information concerning the shipments of the plaintiff's powder, offering to pay for such information at a named rate —$5.00 a letter, as I recall it. This was peremptorily refused by such agent, and as I recall it it is the only proof of any attempt to secure such information. This, of course, was a reprehensible act. What does such an act, in the light of all the circumstances surrounding it, and keeping in mind other facts in the case bearing upon the keen competition that took place between the defendant's and plaintiff's powders in that district, indicate? The plaintiff was a newcomer in a field already occupied. Except as to new business, it is inevitable that in order for the plaintiff to place its output it would draw some of the custom that theretofore had been flowing to the defendant or some other competitor. All of them had a right to compete for such business. None of them had the right, however, to use any but lawful methods. To retain one's own customers obtained by lawful means or to secure new ones is lawful, provided no unlawful means are used. The mere ascertaining to what person or place a competitor's product is being shipped is a legitimate means of keeping tab on the trade, and if a particular competitor has been making inroads upon the established trade of another, such other may properly

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9619 *Assignment of Errors 17-18*

keep a surveillance over the conduct of such new competitor; but while this is lawful, it may be readily noted that an unlawful use of such information may be made."

17. In refusing to correct the error of the District Court in refusing to allow John G. Miller, a witness for plaintiff, while on direct examination, to answer the following questions—he having already been permitted to testify that he had endeavored to sell Buckeye Powder to certain persons whom he knew to be under contract to pur-
9620 chase powder from the Laflin & Rand Powder Company, and that he failed to sell to such persons, and that they gave him reasons why they did not or would not purchase powder of him:

"Q. State what those reasons were as given by them.

"Did any of those reasons which were given to you involve the question of these contracts which were in existence?

"Q. Did any of the reasons which were given to you by these parties or any of them involve the question of special prices that had been made to them by any other manufacturer of powder?"

9621 18. In refusing to correct the error of the District Court in refusing to permit the plaintiff to read to the jury a certain letter written by Thomas Mackie to the Buckeye Powder Company, and dated at Kansas City, Mo., May 24, 1906, and reading as follows:

"Kansas City, Mo., May 24, 1906.

"Buckeye Powder Co.,
Peoria, Ill.:

"Gentlemen—we will soon be ready to enter into a contract for our powder requirements for

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the ensuing year or for the next two or three years, and would be pleased to have you make us a proposition covering same.

"Kindly let us hear from you at your earliest convenience, and greatly oblige,

Yours truly,

Thomas Mackie,
Genl. Pur. Agt."

19. In refusing to correct the error of the District Court in refusing to permit the plaintiff to read to the jury a certain letter written by Thomas Mackie to the Buckeye Powder Company, and dated 9623
at Kansas City, Mo., August 15, 1906, and reading as follows:

"Kansas City, Mo., August 15, 1906.

"Mr. R. S. Waddell,
Prest. Buckeye Powder Co.,
Peoria, Ill.:

"Dear Sir—Referring to your letter of May 26th quoting prices on powder delivered at our various camps for the ensuing year, beg to state that this matter has just been determined and I regret to advise that you were not the successful bidders.

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Yours truly,

Thomas Mackie,
Genl. Pur. Agent."

20. In refusing to correct the error of the District Court in refusing to permit the plaintiff to read to the jury a certain letter signed by the Waverly Coal & Mining Company, by J. W. Ferguson, President, and addressed to the Buckeye Powder Company, and dated at Kansas City, Kansas, February 17, 1906:

9625 "Kansas City, Kansas, Feb. 17th, 1906.

"Buckeye Powder Co.,
Peoria, Ill.:

"Gentlemen—I wired you today cancelling car of CC Special Powder. I am somewhat tied up with the Du Pont Company and I am obliged to do this. If you have invoiced this car and it is shipped, or if you consider that the powder belongs to us, ship it at once and date your invoice Feb. 16th. Ship by as slow freight as you please, as I do not care for it before the 1st of March, or even the 10th of March. I say this
9626 because I do not wish to pay for it until say 90 days. If you are willing to do this, ship it as directed, but don't give me away to the Du Pont powder people.

"I will be clear of them in a few months. Wire me what you do. Saying you had shipped Feb. 16.

Respectfully,

Waverly Coal & Mining Co.,
by J. W. Ferguson, Pres."

21. In refusing to correct the error of the District Court in refusing to receive in evidence on behalf of the plaintiff certain letters written by
9627 J. H. Somers & Company to the Buckeye Powder Company, reading as follows, to wit:

"J. H. Somers & Co.
Cleveland, Sept. 10, 1904.

Buckeye Powder Co.,
Peoria, Ill.

Gentlemen:

Your Mr. R. S. Waddell was here the 5th and promised to send me some samples of your powder. One or two other large users of powder with their offices in this city have been in to see me in regard to your powder. I have asked them to defer their orders or any changes they would make until after these samples had ar-

9628

rived and we had made a thorough investigation of your ability to turn out the kind of powder we require.

The samples Mr. Waddell had with him were beyond question in regard to quality, etc. Some of these other companies I speak of have no contract for powder, consequently you could start to doing business with them at once. It is a little different with us; we are tied up with a contract for the next few months but expect to make some change if we are not taken care of a little better than we have been.

Please forward these samples at once, and oblige,

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Yours truly,
J. H. Somers & Co.,
Wm. D. Somers, Pur. Agt."

"J. H. Somers & Co.,
Cleveland, January 31, 1905.
Buckeye Powder Company,
Peoria, Ill.
Gentlemen:

"We have yours of the 28th inst., and in reply will state our present contract does not expire until March. It might be well for you to take this matter up with us at that time.

Your statement that your powder is 'excelled by none' must be correct, as we have heard several parties speak well of your product, and we have a set of your samples, which also speak well for themselves. 9630

We use very little Single F powder. In Michigan we use only FF. Our three mines in this territory have used about 6,000 kegs of FF since October 1st. When Mr. Waddell was in Cleveland he stated your mill was either well supplied with F or FF, the writer does not remember which.

We have been informed that you have been very successful in your new enterprise, and we

9631 *Assignment of Error 21*

are very glad you have met with this success, which, no doubt, is due you.

Yours very truly,
J. H. Somers & Co.,
Wm. D. Somers, Pur. Agt."

"J. H. Somers & Co.,
Cleveland, March 8, 1905.

The Buckeye Powder Company,
Peoria, Ill.

Gentlemen:

9632 We have yours of the 3rd inst., with reference to furnishing powder for our Michigan properties, and note what you say in regard to Mr. Steven Corvin, as being our agent. You have failed to quote us prices on powder, and we would ask you to kindly take this matter up at once and give us your best price delivered St. Charles, Mich.

We have purchased 7,200 kegs of FF powder since October 1st for these properties and you can tell by these figures about how much we will use per year, especially as the coal business in this particular district last winter was not very good.

We might say in conclusion that we expect to buy powder a little cheaper this year than last,
9633 and this business no doubt will be yours if you quote the right price.

Yours very truly,
J. H. Somers & Co.,
Wm. D. Somers, Pur. Agt."

"J. H. Somers & Co.
Cleveland, March 25, 1905.

The Buckeye Powder Company,
Peoria, Ill.

Gentlemen:

We have yours of the 23rd inst. with reference to furnishing powder for our Michigan

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mines. We are sorry to state that your price quoted several days ago did not meet favor, and as you said you can meet any price that is named we will wait until you make another quotation before we place this business.

We have a much better price than the one you have quoted and while we are very anxious to give our friend Mr. Corvin this business, yet we cannot see our way clear to pay a higher price for your powder than we would have to pay for the powder we have been using in the past.

Yours very truly,
J. H. Somers & Co.,
Wm. D. Somers, Pur. Agt."

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"J. H. Somers & Co.
Cleveland, April 15, 1905.

The Buckeye Powder Company,
Peoria, Ill.

Gentlemen:

We are a little late in acknowledging receipt of your quotation of March 31st, however, we have been thinking the matter over and have been in constant correspondence with our superintendent at St. Charles in regard to the matter.

In your letter you state if any Powder Company made us a better price than 1.05 delivered they were entitled to the business. We have the better price all right—same being $1.02½, but we have not decided definitely in regard to the Michigan business. As we use a great deal of powder and have always been well taken care of, we want to know positively if we can get powder promptly after we have placed our order for the same. We have been signed up for some time for our powder in Ohio, and have included the Michigan properties in this contract in a way that we can purchase powder from the same company we purchase our Ohio powder, providing we do not give you the business.

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9637 *Assignment of Errors 22-23*

We cannot give you any definite information on this matter until our superintendent has time to render his decision.

Yours very truly,
J. H. Somers & Co.,
Wm. D. Somers, Pur. Agt."

"J. H. Somers & Co.
Cleveland, Aug. 23, 1905.

Buckeye Powder Company,
Peoria, Ill.

Gentlemen:

9638 We herewith enclose our order #1248 for one carload of FF blasting powder, price to be $1.02½ delivered as per your letter of Aug. 21st. You no doubt have been advised by Mr. Corvin that we are buying our powder for $1.00 per keg at the present time. We are willing to pay you 2½ per keg on this order as we are anxious to give your powder a trial.

Yours truly,
J. H. Somers Coal Co.,
Wm. D. Somers, Pur. Agt."

22. In refusing to correct the error of the District Court in refusing to admit the interlocutory decree and the final decree of the United States
9639 District Court for the District of Delaware, in the case of United States of America, petitioner, against E. I. du Pont de Nemours & Company, *et al.*, defendants.

23. In refusing to correct the error of the District Court in refusing to permit R. S. Waddell, a witness for plaintiff in error, while under redirect examination, to state what the information was which he gave to plaintiff's attorneys upon which the allegations set forth in paragraph 11 of the amended declaration were based—counsel for

defendants in error on cross-examination having already been permitted to read the said paragraph to the said witness, and thereupon to ask him whether he gave his attorneys the information upon which the said allegations were based, to which the said witness replied that he did and would be glad to state them to the jury. 9640

24. In refusing to correct the error of the District Court in permitting Olive Taylor, a witness for the defendant, to testify as follows:

"Q. Now, Mrs. Taylor, in a suit instituted in the United States District Court for the District of New Jersey, by the Buckeye Powder Company against the E. I. du Pont de Nemours Powder Company and two other companies, known as the International Smokeless Powder and Chemical Company and the Eastern Dynamite Company, the Buckeye Powder Company, in answer to a demand for the names of customers of the Buckeye Powder Company induced by the defendants, or by the other persons or corporations I will name to you, the Buckeye Powder Company has given the name of Howarth and Taylor as one of the customers of the Buckeye Powder Company which was induced by these defendants and persons which I will name, to abandon the purchase of powder from the Buckeye Powder Company. The names of these persons are: Thomas Coleman du Pont, Pierre S. du Pont, Alexis I. du Pont, Alfred I. du Pont, Eugene du Pont, Eugene E. du Pont, Henry E. du Pont, Irene du Pont, Francis I. du Pont, Victor du Pont, Jr., Arthur J. Moxham, Hamilton M. Barksdale, Edmund G. Buckner, Frank L. Connable, Jonathan A. Haskell, and the following corporations: International Smokeless Powder and Chemical Company, E. I. du Pont de Nemours and Company, E. I. du Pont de Nemours and Company of Pennsylvania, du Pont International Powder Company, Delaware Secu- 9641 9642

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rities Company, California Investment Company, Delaware Investment Company, Hazard Powder Company, Laflin & Rand Powder Company, Fairmont Powder Company, and Judson Dynamite and Powder Company. Will you now state whether or not any of the persons that I have mentioned here, or any of the corporations which I have mentioned in this question, or any agent or representative of those persons or corporations, ever induced you, as purchasing agent for your husband, Daniel Taylor, trading as Howarth & Taylor, not to purchase powder of the Buckeye Powder Company? A. No, sir."

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25. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

"Plaintiff claims thirty cents a keg profit, but there is no evidence in the case that would justify the conclusion that that was a fair profit."

26. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

"In this case the statute of limitations pleaded by the defendant furnishes a line of demarkation between the two periods of the plaintiff's

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business. The 18th of September, 1905, fixes the dividing line and the plaintiff seeks to recover anticipated profits on the kegs of powder manufactured and sold for the three years since that date. The plaintiff claims that up to the 18th day of September, 1905, and covering a period of twenty-two months, it carried on its business profitably. The average profit per keg during such period, according to this claim, is 3 1/7 cents. This price per keg it figures from $6,470.61, which is the sum that the plaintiff claims its books show as the amount of the net profits made during the said twenty-two months and the

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number of kegs upon which the 3 1/7 cents per keg profit is based is 205,931. What I said to you concerning those books as evidence when dealing with the alleged cost of the plant is applicable here. It is only in case you find that these books have been so kept that you can ascertain therefrom with certainty that a profit was made during this period, and the amount of such profit, that you can use that profit as a basis for a comparison upon the question of profits during the subsequent period. If you can not ascertain what were the actual profits by resorting to such books, of course, the inquiry as to profits at all fails for the lack of proof, and no allowance of profits can be made. If, on the contrary, however, it can be ascertained from such books with certainty that profits were made, and what was the amount of them, then the next question arises whether this period of twenty-two months was sufficiently long in view of the trade conditions prevailing, whatever may have been the cause thereof, to establish with reasonable certainty what the anticipated profits for the period subsequent to this 18th day of September, 1905, would have been if normal trade conditions had prevailed. Now, according to one contention, normal trade conditions did not obtain during this twenty-two months ending with the eighteenth day of September, 1905, while according to another contention that the conditions prevailing during that period, as well as during the period following, were normal; and that they were just such conditions as would be likely to follow the abandonment of the Trade Association, which you know finally was dissolved in June, 1904. Whether they be normal or abnormal, if it be a fact that during that period the plaintiff made profits, they furnish a sufficient basis for comparison with subsequent years for me to submit it to your consideration; but it will be for you to say whether as a fact that period was sufficiently long to furnish a basis for comparison with subsequent years. If you should

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9649 find that it isn't sufficient to furnish such a basis, even though you should have found that during the twenty-two months the plaintiff made a profit, the further inquiry as to profits during the remaining years must end, and no profits can be allowed. If, however, you find that it does furnish a satisfactory basis, then you will allow as profits upon the kegs manufactured during such subsequent period all or so much of such 3 1/7 cents per keg as you shall find was the profit per keg on the 224,683 kegs as is shown were made during the three years following September 18, 1905.

9650 "The defendant challenges the correctness of the sum alleged to have been made as profits during the twenty-two months referred to, claiming that the items of salary paid to the Waddells, and the loss sustained in the explosions, one of which I considered a short time ago, when dealing with the question of the book value of the plant, should have been charged to the running or working expense during those twenty-two months, instead of to construction, and that if they had been this amount would have been totally wiped out. If that is the fact, of course, there is no standard here upon which you can calculate profit for the 224,683 kegs which were made and sold; but if you should find that only a part of such salaries and explosion losses, and which were

9651 charged to the construction account, should have been charged to running expense, and after deducting from this sum total, namely, $6,470.61, such amount so found, there remains a profit, that profit will furnish the standard; and when you have ascertained the price per keg such profit represents that will be the profit per keg, and not the 3 1/7 cents per keg that has been allowed as the anticipated profits upon the kegs actually sold."

27. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

Assignment of Error 28 9652

"As the evidence does not furnish us with a legal basis upon which we can determine, as a matter of fact, that the plaintiff could have sold on a profitable basis any more powder than it actually sold, no allowance can be made for such unmade or unsold merchandise."

28. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

"So far I have been dealing with the value of the plant simply as a tangible or physical property. A manufacturing plant, however, may 9653
have another and additional value, namely, its good-will; and as the plaintiff claims that it has suffered damages to its good-will, that phase will now be considered. Good-will may be defined for present purposes as 'the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or from celebrity or reputation for skill, or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.' Establishment of a profitable business is the essential of the good-will. 9354
Where that does not exist there can be no good-will.

"The very contention of the plaintiff on another branch of the matter of damages is that from September 18, 1905, until the time that it ceased doing business, it was conducting an unprofitable business; and as the losses said to have been incurred during this period largely overcame the profits claimed to have been made for the twenty-two months preceding we have as the only basis for a good-will, not that a pecuniary advantage or benefit was secured by the plaintiff during the time it was in business, but

9655 *Assignment of Error 29*

that it would have done so except for the wrongful acts of the defendant, and that for a part of such time it actually did make a profit.

"True, a person may be wrongfully prevented from acquiring a good-will; and ethically such a wrong is just as injurious as if an established good-will was injured by such wrong doing. The rule in allowing as well as estimating damages, however, is a practical, rather than an ethical standard, and this excludes all damages that are purely speculative and contingent. To attempt to create out of unknown quantities a good-will for the purpose of giving it a value
9656 when no past conditions establishing a good-will exist, would be but a pure speculation, and therefore not allowable. The claim of damages for good-will therefore must be disallowed."

29. In refusing to correct the error of the District Court in refusing to grant plaintiff in error a new trial, for the reasons and causes therefor shown as follows:

"1. Because the verdict in favor of the E. I. du Pont Nemours Powder Company, returned herein on the 25th day of February, 1914, is against the clear weight of the evidence.

"2. Because the verdict for the Eastern Dynamite Company and International Smokeless Pow-
9657 der and Chemical Company, returned herein on the 25th day of February, 1914, is against the clear weight of the evidence.

"3. Because said verdict rendered in favor of the E. I. du Pont Nemours Powder Company is against the law.

"4. Because said verdict in favor of the Eastern Dynamite Company and International Smokeless Powder and Chemical Company is against the law.

"5. Because the charge of the Court was erroneous in law.

"6. Because of the failure of the Court to instruct the jury on material issues in its charge to the jury.

Assignment of Error 29

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"7. Because of the refusal of the Court to instruct the jury on material issues as requested by the plaintiff in its charge to the jury.

"8. Because the jury while deliberating upon their verdict had before them a large number of letters, files, pleadings, and other papers that were not in evidence in said case and which they examined and inspected contrary to law."

WHEREFORE, the plaintiff in error prays that said judgment may be reversed and the errors above stated be corrected and a new trial of the issues in this action be directed.

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TWYMAN O. ABBOTT,

WILLARD U. TAYLOR,

WALTER J. BARTWELL,

Attorneys for Plaintiff in Error,

63 Wall Street,

New York City.

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9661 KNOW ALL MEN BY THESE PRESENTS,—

That We, THE BUCKEYE POWDER COMPANY, a corporation, as principal, and the UNITED STATES FIDELITY AND GUARANTY COMPANY as surety, are held and firmly bound unto E. I. DU PONT DE NEMOURS POWDER COMPANY, a corporation of New Jersey, EASTERN DYNAMITE COMPANY, a corporation of New Jersey, INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY, a corporation of New Jersey, in the full and just sum of Two HUNDRED AND FIFTY ($250.00) DOLLARS to be paid to the said E. I. DU PONT DE NEMOURS POWDER
9662 COMPANY, a corporation of New Jersey, EASTERN DYNAMITE COMPANY, a corportaion of New Jersey, INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY, a corporation of New Jersey, their certain attorney, their successors or assigns, to which payment well and truly to be made, we bind ourselves, and our successors jointly and severally by these presents.

SEALED WITH OUR SEALS and dated this 20th day of August, 1915.

WHEREAS, lately at a term of the United States Circuit Court of Appeals for the Third Circuit in a suit depending in said Court between the said
9663 THE BUCKEYE POWDER COMPANY, a corporation, plaintiff in error, and E. I. DU PONT DE NEMOURS POWDER COMPANY, a corporation of New Jersey, EASTERN DYNAMITE COMPANY, a corporation of New Jersey, INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY, a corporation of New Jersey, defendant in error, a decree was entered against the said THE BUCKEYE POWDER COMPANY, a corporation, and the said THE BUCKEYE POWDER COMPANY, a corporation, having obtained an order allowing an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed

to the said E. I. DU PONT DE NEMOURS POWDER COMPANY, a corporation of New Jersey, EASTERN DYNAMITE COMPANY, a corporation of New Jersey, INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY, a corporation of New Jersey, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof. 9664

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said THE BUCKEYE POWDER COMPANY, a corporation, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue. 9665

THE BUCKEYE POWDER COMPANY,
a Corporation. (Seal of company)
By R. S. Waddell, Jr.,
Secy.-Treas. (Seal)

Sealed and delivered in the presence of C. M. JOHNSTON.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,
(Seal of U. S. Fidelity and Guaranty Company)
By (Signed) S. Frank Hedges, 9666
Attorney-in-fact.

Attest:
(Signed) WILLIAM H. ESTWICK,
Attorney-in-fact.

Approved.
(Signed) JOHN B. MCPHERSON,
Judge.

Endorsed: No. 1899.
Bond received and filed Sept. 2, 1915.
SAUNDERS LEWIS, JR., Clerk.

9667 UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } sct.
THIRD JUDICIAL CIRCUIT.

I, SAUNDERS LEWIS, JR., Clerk of the United States Circuit Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of The Buckeye Powder Company, Plaintiff in Error vs. E. I. du Pont de Nemours Powder Company, Eastern Dynamite Company and International Smokeless Powder and Chemical Com-
9668 pany, Defendants in Error, on file, and now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed by name and affixed the seal of the said Court, at Philadelphia, this eighth day of September, in the year of our Lord One thousand nine hundred and fifteen and of the Independence of the United States the One hundred and fortieth.

(Seal of United States Court
of Appeals, Third Circuit.)

9669 WM. P. ROWLAND,
Deputy Clerk of the U. S. Circuit
Court of Appeals, Third Circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between The Buckeye Powder Company, and the E. I. Du Pont de Nemours Powder Company, Eastern Dynamite Company, and International Smokeless Powder and Chemical Company, a manifest error hath happened, to the great damage of the said Buckeye Powder Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the first day of September, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, Jr.,
Clerk United States Circuit Court of Appeals for the Third Circuit.

Allowed by—
JOHN B. McPHERSON,
Circuit Judge.

[Endorsed:] U. S. Circuit Court of Appeals for the Third Circuit. The Buckeye Powder Company, a Corporation, Plaintiff in Error, against E. I. Du Pont de Nemours Powder Company (a Corporation of New Jersey), and others, Defendants in Error. Writ of Error. Twyman O. Abbott, Willard U. Taylor, Walter J. Bartnett, Attorneys for Petitioner, 63 Wall Street, Borough of Manhattan, New York City.

UNITED STATES OF AMERICA, ss:

[Seal United States Circuit Court of Appeals, Third Circuit.]

To the E. I. Du Pont de Nemours Powder Company, Eastern Dynamite Company, and International Smokeless Powder and Chemical Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court of Appeals for the Third Circuit, wherein the Buckeye Powder Company is Plaintiff in Error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

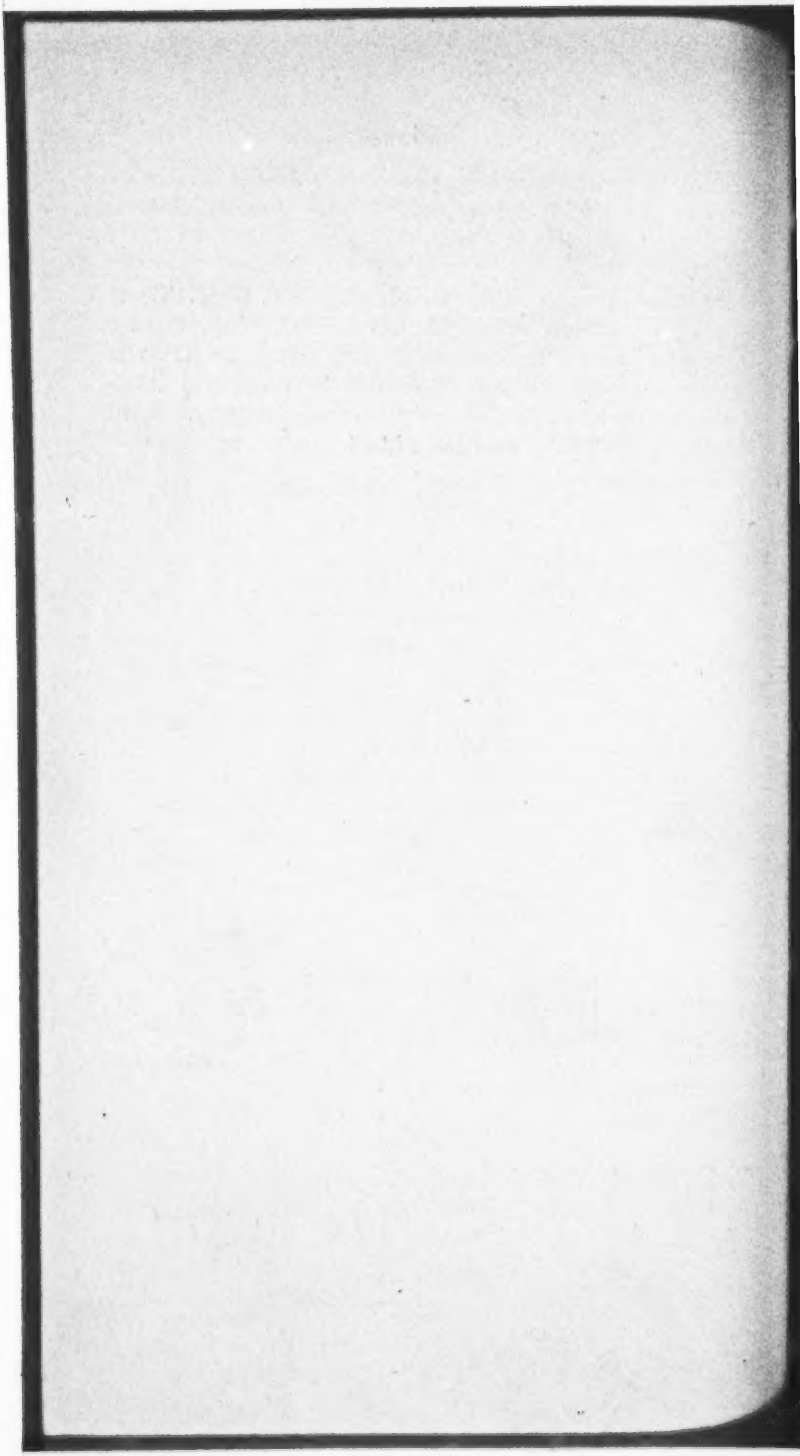
Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this third day of September, in the year of our Lord one thousand nine hundred and fifteen.

JOHN B. McPHERSON,
Circuit Judge.

[Endorsed:] Buckeye Powder Co. vs. E. I. Du Pont de Nemours Powder Co et al. Citation. Service of the within

Citation by receipt of a copy thereof this date is hereby acknowledged. Dated September 7, 1915. Wm. H. Button, Att'y for Defendant in Error.

Endorsed on cover: File No. 24,926. U. S. Circuit Court Appeals, 3rd Circuit. Term No. 643. The Buckeye Powder Company, plaintiff in error, vs. E. I. Du Pont de Nemours Powder Company, Eastern Dynamite Company, and International Smokeless Powder and Chemical Company. Filed September 28, 1915. File No. 24,926.



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No. 7

Office Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1916

THE BUCKEYE POWDER COMPANY (a Corporation)

Plaintiff-in-Error

against

E. I. Du Pont de Nemours Powder Company (a Corporation of New Jersey), Eastern Dynamite Company (a Corporation of New Jersey) and International Smokeless Powder & Chemical Company (a Corporation of New Jersey)

Defendants-in-Error

In Error to the United States Circuit Court of Appeals for the Third Circuit

BRIEF OF PLAINTIFF-IN-ERROR

TWYMAN O. ABBOTT
WILLARD U. TAYLOR
Counsel for Plaintiff-in-Error

Telephone 1697 Worth THE WEIDEMAHL PRINT 29 Elm St., N. Y.
— 1917 —

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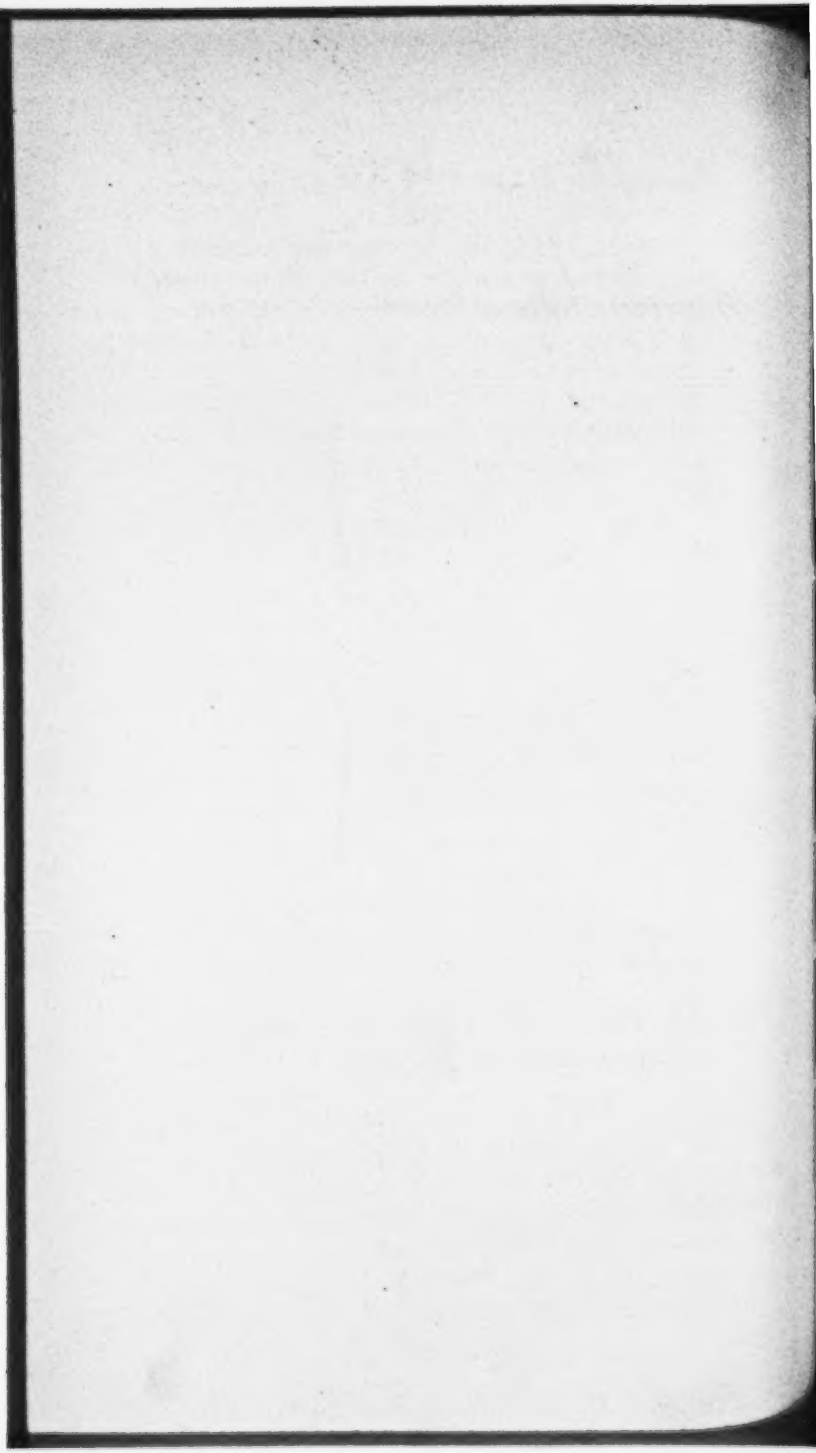

Supreme Court of the United States

OCTOBER TERM, 1916.

THE BUCKEYE POWDER COMPANY (a corporation), *Plaintiff-in-Error,* *against* E. I. DU PONT DE NEMOURS POWDER COMPANY (a corporation of New Jersey), EASTERN DYNAMITE COMPANY (a corporation of New Jersey), INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY (a corporation of New Jersey), *Defendants-in-Error.*	No. 249.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF PLAINTIFF-IN-ERROR.

The Nature of the Proceedings.

This is an action brought by the plaintiff-in-error to recover damages from the defendants-in-error under the provisions of Section 7 of the Act of Congress of July 2, 1890, commonly known as the "Sherman Law," which reads:

> "Any person who shall be injured in his business or property by any other person or

corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor in any Circuit Court of the United States in the District in which the defendant resides or is found, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The things "forbidden or declared to be unlawful by this Act" are as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misde meanor."

The Trial.

The action was tried by a jury.

The Court instructed the jury to return a verdict "of no cause of action" in favor of the Eastern Dynamite Company and the International Smokeless Powder & Chemical Company, and the jury also returned a verdict to the same effect in favor of the remaining defendant E. I. Du Pont de Nemours Powder Company.

Statement of the Case—The Parties—The Pleadings.

The plaintiff. The plaintiff is a corporation organized on the 28th day of January, 1903, for the purpose of manufacturing explosives; its plant was located at Peoria, Illinois; it began business about the 1st day of September, 1903, and continued in business down to the 19th day of September, 1908. Its organization was principally due to Mr. R. S. Waddell, who had been in the employ of the Hazard and Du Pont Powder Companies for nearly twenty years.

The defendants. The original declaration named 28 corporations and persons as defendants, which had already been held to be acting together as an unlawful combination during the period that plaintiff did business. (See *United States vs. E. I. Du Pont de Nemours & Co.*, 188 Fed., 127.) Plaintiff was able to obtain service upon only three of them, namely, The E. I. Du Pont de Nemours Powder Company, The Eastern Dynamite Company and The International Smokeless Powder and Chemical Company, all New Jersey corporations. As the result of an application by the served defendants for a rule to strike the declaration, the Court directed that the names of all the persons and corporations who had not been served should be stricken from the declaration.

See *Buckeye Powder Co. vs. E. I. Du Pont de Nemours Powder Co.*, 196 Fed., 514, 520.

An amended declaration was thereupon filed, in which only the three corporations above named were made defendants, the other parties being described as "co-conspirators," no relief being asked against them.

The case went to trial upon the Amended Dec-

laration and the separate pleas of the defendants that they were not guilty of the grievances with which they were charged, and that the action was barred by the statute of limitations.

The Amended Declaration is lengthy and the various allegations can best be considered in connection with the Assignments of Error, as they are discussed. Briefly summarized, they are as follows:

It is alleged that for more than 30 years previous to 1902 a large number of manufacturers and vendors of explosives who were engaged in interstate commerce (whose names are set forth), attempted to establish a monopoly in said trade; that in so doing they entered into many agreements and adopted many forms by which they regulated and apportioned the trade among themselves, fixed prices, and imposed fines and penalties for the disobedience or disregard of such agreements; that by forcing competitors out of business or by coercing them into a union with them, they succeeded in establishing a practical monopoly of the explosives trade in the United States; that on or about February, 1902, the idea was conceived of bringing together, under one *corporate* control, all the various corporations and persons composing the combination; that (by means which will be presently noted) the defendant E. I. Du Pont de Nemours Powder Company was organized under the laws of New Jersey, and the actual physical or legal control and ownership of the plants, manufactories and tangible property which belonged to these various corporations and persons was ultimately acquired by it, and thereupon all the various corporations whose properties had been thus acquired were dissolved and thus removed from the explosives field. (See Par. Third and Fourth, Trans., pp. 3-9.)

That one R. S. Waddell who had been an employee of the Du Pont interests for many years, having determined to establish a powder business for himself, conceived the idea of organizing Plaintiff: that when the Defendants learned of his purpose, they attempted to prevent him from carrying out his plan, so as to perpetuate the monopoly which they had acquired; first, they tried to dissuade him; failing in that they offered to join him if he would place a controlling interest in their control; failing in that they tried to influence him to locate in a section of the country where their monopoly would be as little interfered with as possible. Negotiations between them having failed of results, Mr. Waddell set about to find a location;that the defendants placed detectives on his track to follow him about from place to place thus to keep advised of his plans and movements, with a view to creating opposition among the inhabitants of such localities as should be considered by him and thus embarrass and perhaps prevent him from obtaining a site; that he disguised himself and travelled under assumed names and managed to avoid this surveillance and finally, a good location was secured near Peoria, Illinois, tributary to a large and growing powder market and possessing good railroad facilities and favorable freight rates; that in February 1903, plaintiff was organized and erected its plant and began business in September 1903; that by reason of the excellence of its location plaintiff was in a position to compete in fair and open competition; that defendants, realizing this, entered into a conspiracy to drive it out of business, and thereafter carried on a determined warfare for this purpose—the salient features of which warfare were the employment of spies to enter its

mills and obtain its business secrets, the employment of railway agents to divulge information concerning its shipments so that its customers might be induced to abandon it, the employment of leading and influential coal miners to circulate among their fellow workmen and stir up opposition to plaintiff's powder so as to force its customers to abandon it, the offer of secret rebates for the purpose of inducing consumers to enter into long-time contracts for the purchase of all their explosive requirements of the defendants, and by making prices which were not regulated by any law of supply and demand but which were determined solely by what would be a sufficient inducement to the consumer to give all his trade to them, even below cost, thus forcing plaintiff to surrender the trade; that this situation obtained for a period of about five years while plaintiff continued in business and by reason of which it sustained such loss of trade that on September 18, 1908, it was compelled to retire from business altogether. (See Par. Sixth to Twelfth, Trans., pp. 9-25.)

That when plaintiff found itself unable to withstand the great and continuing losses forced upon it by such unlawful and wrongful acts it was finally compelled to offer its mills and plant for sale; that it made many efforts to find a purchaser without success, largely because the methods of the defendants in forcing competitors to retire from the explosives field had become generally well known among the usual investors in powder properties, and it was difficult to induce them to invest in independent properties; that it was ultimately forced to accept an offer made by one Franklin W. Olin, of $70,000 for the entire plant, business and good will, and $5,504.08 for its stock on hand;

but, it is also alleged, Olin purchased the plant at the instance and request of the defendant E. I. Du Pont de Nemours Powder Company, who as a special inducement and, as part of the conspiracy, contracted with him to purchase from him after he should acquire the plant, 95% of its future entire output, for a long period; that Olin was at the time president of the Equitable Powder Manufacturing Company, in which the defendant E. I. Du Pont de Nemours Powder Company was then and for a long time prior had been the owner of 49% of its stock; that he at once organized the Western Powder Manufacturing Company, which took over the plant which he had purchased from plaintiff, and that its output was allotted to the Du Pont Powder Company and its associates, since which time said plant has been operated successfully. (Par. Fifteenth, Trans., p. 27.)

Damages were claimed on account of the loss of the true and fair value of the plant, mills, business and good will, which was alleged to be the sum of $430,000. (Ibid. fol. 90.)

Damages were also claimed for loss of profits as follows: It was alleged that the total capacity of plaintiff's mills was 300,000 kegs per year; that its inability to keep its mills working at full capacity was due to and was the *natural and proximate consequence* of the wrongful acts of the defendants, and that it was prevented from making a fair profit on the powder *actually* sold by it; and also on the amount of powder that it would have manufactured and sold if it had been permitted to operate at its full capacity; and also for future profits which it was prevented from obtaining by being driven out of business; that the fair profit per keg, during this period, was

30 cents, after deducting expenses of manufacture, sale and transportation; and damages at the rate of 30 cents per keg, were claimed on all powder manufactured by it (less the amount actually received) as well as that which it was prevented from manufacturing, all of which totaled the sum of $690,361.90. (Par. Sixteenth, Trans., pp. 30-34.)

Summary of Assignments of Error and Points of Argument.

There are 29 Assignments of Error, but we have grouped and discussed them below under 16 points. Some of these errors relate to the admission or rejection of evidence, but most of them to errors committed by the court in its charge to the jury.

It will serve to a better understanding of the contentions of the plaintiff, to here briefly summarize these Points and the errors discussed.

POINT I. The Court instructed the jury to return a verdict in favor of the Eastern Dynamite Co. and the International Smokeless Powder Co. upon the ground that the evidence failed to support any "participation" by either of said defendants, in any overt act by which the plaintiff claims to have been damaged. Plaintiff's contention is (a) that the evidence shows that these defendants were members of the general conspiracy which was engaged in monopolizing the trade in "powder and *other* explosives," and that, as a matter of law, they were each equally guilty with the remaining defendant the Du Pont Powder Company, and were liable for all the damages which resulted from any act performed by that

company, whether they actually "participated" in or had any actual knowledge of any such act or not; and (b) that, besides, the evidence does show actual and legal participation and knowledge on the part of both these defendants. Involved in this question is the legal effect of stock ownership. (See Assignment No. 3, and discussion infra, p. 25.)

POINT II. This error involves in part, a question of fact and law similar to Point I, at least in so far as it relates to ostensibly *separate,* but in reality *combined* interests, and for that reason is presented somewhat out of its order. It relates to plaintiff's allegation that after its business had been ruined by the defendants and it had been forced to sell its plant, Franklin W. Olin and Almon Lent purchased it at the instance of and in conspiracy with the defendant Du Pont Powder Company, as a part of the plan to drive plaintiff out of business. The Court instructed the jury that "there is no evidence showing that any of the defendants knew or had anything to do with the purchase" of plaintiff's plant, and that they must not consider the fact of such purchase as tending to establish any unlawful conduct on their part. The *undisputed* evidence shows (a) that Mr. Olin was at the time, president of the Equitable Powder Company, located in Illinois, and Mr. Lent was president of the Austin Powder Company, located in Ohio, and each of these gentlemen had been for many years active officers of the various unlawful associations which were composed of the Du Pont Powder Company and others engaged in the explosives trade; that during all this time the Du Pont Powder Company was the owner of a very large part of the stock of both the Equitable

and Austin Companies; and (b) that two of its vice-presidents were on the Board of the Equitable Company; and (c) that a new company, called the Western Powder Manufacturing Company, was organized by Messrs. Olin & Lent, to take over the title to the plant purchased by them, and the stock of the new Company was in its turn owned by one of the subsidiaries of the Equitable Powder Company—thus making the Du Pont Company indirectly interested in the ownership of the plant; and (d) that as an inducement for Messrs. Olin and Lent to purchase, a contract was entered into between Mr. Olin and the Du Pont Powder Company whereby that Company agreed to take from 75,000 to 100,000 kegs of powder per year to be manufactured at this plant. There was other evidence (fully discussed below) which tended to support this allegation. Plaintiff's contention is that all this evidence furnished ample ground for the jury to find that defendants induced Olin and Lent to purchase plaintiff's plant and that it was for the jury alone to weigh and pass upon. (See Assignments Nos. 10, 11, and discussion, infra, p. 109.)

POINT III. At the end of the trial, the Court required plaintiff to make an election between Sections 1 and 2 of the Sherman Act upon the theory that the things declared to be unlawful by each section formed a separate cause of action. The plaintiff contends that Section 7 of the Sherman Act prescribing a remedy for injuries suffered "by reason of anything forbidden or declared to be unlawful by this Act," gives the plaintiff a single and indivisible right of action; and that it is not necessary to plead the offenses under each section as separate causes of action. (See Assignment No. 4, and discussion infra, p. 131.)

POINT IV. The Court instructed the jury that the plaintiff came into being as a result of the efforts of R. S. Waddell, who had formerly been identified with the Du Pont interests for a period of twenty years, and who had thus become familiar with the unlawful business policies and practices by which that company had developed its influence, and who knew of the existence of the various trade associations and of the restraints and limitations which they had put upon their members in apportioning trade and fixing prices; and that when he conceived the idea of severing his connection with these interests and of organizing the plaintiff, and began to carry out his purpose to enter into competition with them, he knew these facts and knew the relation of the Du Pont Company to the explosives industry, of its comparative size with other powder manufacturers and of its influence as a factor in the trade—that, therefore, "the plaintiff does not occupy the same position as a competitor in existence during the period that this influence was being developed, and who may have been during the course of such development, as well as after it had reached the height of its power, injured in its business or property by reason thereof; but is here as one entering the competitive field when such growth and influence has been established." Plaintiff contends that this instruction was a virtual direction of a verdict for the defendants, because it was equivalent to saying that long continued violation of the law may ripen into privilege and may become a vested right, and that the defendant had acquired a right by prescription to perpetuate the monopoly which had been established; and that plaintiff entered the powder field and began

business *at its peril,* knowing that the field was already occupied by a powerful combination of interests which would continue to carry out the long settled and unlawful policies and practices, by which it had secured its domination and monopoly of the powder trade. (See Assignment No. 5 and discussion, infra, p. 144.)

POINT V. The Court reiterated to the jury that because Mr. Waddell was so well advised of the defendants' policies and practices, and knew of the severe competitive struggles which several newcomers in the powder field had been subjected to, and which had resulted in the taking over of the newcomers at a considerable profit, "if he was actuated by the belief that his company would meet with a like experience after some competitive struggles, it might have a bearing upon the question whether the plaintiff was sufficiently capitalized to engage in the struggle for the market already occupied." This error is akin to that just pointed out, but plaintiff contends (a) that the motive of a party in bringing an action, however unworthy it may be, is immaterial if the cause of action itself is valid, and, therefore, (b) that it is not to be deprived of redress for injuries suffered at the hands of the defendants by their violation of the Anti-Trust Act upon the plea that Mr. Waddell might have been actuated by the expectation of profits to be realized from defendants' desire to control the powder trade; and further (c) that even if motives were admissible, the evidence does not justify any imputations upon the motives and intentions of Mr. Waddell, or the plaintiff. (See Assignment No. 6 and discussion, infra, p. 157.)

POINT VI. The Court told the jury that

"competition" "as it exists *under the law,*" was a "fight" in which the "fair fighter" may go away with the "spoils"; and said that the "mere fact that a new competitor suffers injury through severe competition" at the hands of one who had been long established in business, did not make the competitor who had come out of the "fray" successfully, liable to compensate the loss. Plaintiff contends (a) that it is very misleading, incorrect and harmful in an action of this character to say that "fighting", "spoils" and "fray" are recognized *under the law* as necessary and proper elements of competition; (b) that the law encourages individual traders to engage in fair rivalry, not "fighting for spoils," to the end that each may receive a fair profit and the public be protected from excessive charges; and (c) that plaintiff's right to recover did not depend upon "fair fighting" or "unfair fighting" between *individual* traders, but whether a *combination* of individuals had injured it in its business or property "by reason of *anything* forbidden or declared to be unlawful" by the Sherman act; and that it is immaterial whether such injury results from "fair" or "unfair" competition, so long as it was caused by individuals who have combined or conspired to restrain trade (as prohibited by Sec. 1) or have monopolized or attempted to monopolize trade (as prohibited by Sec. 2). (See Assignment No. 7 and discussion, infra, p. 169.)

POINT VII. One of the charges in the Declaration was that the defendants employed detectives to follow Mr. Waddell, while he was seeking a site for his plant, in order to forestall him in the purchase thereof by stirring up opposition among the inhabitants of the neighborhood where he proposed to locate. Plaintiff introduced some evi-

dence in support of this charge, and offered other evidence which was refused. The Court instructed the jury that there was *no evidence* whatever to justify this charge. Both the refusal and the instruction are assigned as errors. The defendants *admitted* that they employed detectives, and that they followed Mr. Waddell about the country for several weeks but denied the *purpose* to be as charged. Plaintiff contends that the evidence which was received was sufficient to justify the jury in arriving at the conclusion contended for by plaintiff, and that it was for the jury to determine its weight and sufficiency, and that the evidence which was refused would have assisted them in arriving at a conclusion. (See Assignments Nos. 8, 9, and discussion at p. 175, infra.)

POINT VIII. The plaintiff alleged that the defendants sold their product below cost when necessary to drive competitors out of business. The Court charged the jury that there was *no evidence* to support this allegation. Plaintiff contends that the evidence shows that the cost of making and selling black blasting powder, including overhead and freight charges was about 95 cents per keg; and that the long-established custom of the trade which was relied upon by buyers and shippers demanded a *uniform* price, arranged according to *districts;* that the coal business was conducted on this basis and freight rates were adjusted to it; that the prevailing price, under normal conditions, east of the Mississippi River was $1.20 per keg, and west of the Mississippi $1.35 per keg; but that prices were made by members of the Gunpowder Trade Association in competition with non-members as low as 75 cents in 1896, when all competitors were finally brought

into the Association; and that defendant, Du Pont Company, during the years 1905, 1906 and 1907, in competition with the plaintiff, made a *general* cut to 95 cents per keg, in the territory tributary to plaintiff's mills, and a *specific* offer of 95 cents to 445 consumers. (See Assignment No. 12 and discussion, infra, p. 181.)

POINT IX. Plaintiff charged that one of the means used by the defendants to destroy its business was to distribute money, intoxicating liquors, etc., among influential coal miners to induce them to stir up strife among their fellow workmen, to bring about boycotts against plaintiff's products. The Court instructed the jury that there was *no evidence* to sustain this charge. This was one of the most important issues in the case, and the evidence is overwhelming in its support—both in specific instances and by necessary inference. It is, in fact, so abundant that it cannot be summarized here. It will be seen however that the greater part of black blasting powder is used in the operation of coal mines; that the mine owner purchases the powder from the manufacturer in large quantities and retails it to the miner as he needs it a keg at a time; that the miner pays the mine-owner a very substantial profit; that this situation has sometimes been taken advantage of by members of the Gunpowder Trade Association to influence the miners to oppose the use of powder made by competitors; that this practice was followed by the defendant DuPont Company in its competition with the plaintiff, in at least five different specific instances; that some of the miners who were thus induced to act were themselves witnesses for plaintiff, and one of whom testified, unequivocally, that he received for his services a commission of 5 cents per keg

on all Du Pont powder going into the mine where he was employed—the owners of the mine being customers of plaintiff—and the evidence of the owners is that he was so successful in his efforts that they were finally forced to abandon the use of plaintiff's powder, against their great desire and interest; that P. H. Donnelly and C. B. Spicer, two of defendants' salesmen, and Dooley Bros., its agents at Peoria, Illinois, are shown to have been directly connected with some of these acts; and the proper inference to be drawn from the other testimony leads to no other conclusion than that money was the inducing consideration. Plaintiff contends that it was the sole province of the jury to weigh all the direct evidence and draw proper inferences from the indirect evidence. (See Assignments Nos. 13, 14, and discussion infra, p. 190.)

POINT X. It was charged by the plaintiff that one of the methods used by the defendants to drive it out of business, was the obtaining of its business secrets by enlisting the services of railway employes, particularly of the Chicago, Burlington & Quincy Railroad Co., (which was the initial line of shipment) to furnish advance information of shipments by plaintiff to its customers. The court refused to allow R. S. Waddell, its president, and John G. Miller, one of its agents, to testify concerning an investigation which they caused to be made by the officials of that road, and the result of that investigation. The Court afterwards instructed the jury that there was no proof that the defendants "ever succeeded in getting such information from such employees," and that, in any event, "the plaintiff was a newcomer in a field *already occupied*"; that it was inevitable that, in order for plaintiff to do

business at all, it must draw some custom from the defendants; that they had a right to compete for the business by "lawful methods," and that it was a lawful method to "keep tab" on a competitor's customers, "and if a particular competitor has been making inroads upon the established trade of another, such other may properly *keep a surveillance* over the conduct of such new competitor." Plaintiff contends (a) that the rulings excluding the proferred testimony prevented it from producing the direct evidence that the defendants "succeeded in getting such information from such employees"; and (b) that the instruction prevented the jury from drawing proper inferences from the evidence which was received by the Court; and (c) that an instruction that it was lawful to obtain the business secrets of a competitor by keeping surveillance over its conduct, is erroneous in law, and calculated seriously to mislead the jury. (See Assignments of Error Nos. 14, 15, 16, and discussion infra, p. 238.)

POINT XI. It was charged by the plaintiff that another of the methods used by the defendants to acquire and maintain a monopoly, was to tie up the trade by inducing large consumers of explosives to enter into long time contracts to purchase all their requirements from them. The evidence that this was done, and was developed into a system, is abundant and conclusive. Plaintiff sought to show, by the letters and statements of the customers themselves, what the effect of this system was upon its business, by offering John G. Miller, one of its agents, as a witness to establish that its customers as well as consumers of explosives whose business he sought to secure, gave as the reason why they did not or would not purchase

plaintiff's powder, that they were bound under these contracts to give all their business to the defendants. Plaintiff also offered certain letters written by consumers themselves. The Court refused all this evidence. (See Assignments Nos. 17, 18, 19, 20, 21 and discussion, infra, p. 249.) That this was error is now settled by this Court in *Lawlor vs. Loewe*, 235 U. S., 522.

POINT XII. Near the close of plaintiff's case, it offered the decrees entered by the District Court of Delaware in the Equity Case of the United States against these same defendants, declaring them to have been acting as an unlawful combination during the whole period of plaintiff's existence, and directing their dissolution. The court refused the offer. Plaintiff contends that these decrees were admissible because (a) they were prima facie proof of the unlawful character of the acts complained of and which had been established by the evidence already in when the offer was made; and (b) were also evidence of the pertinent *fact* of the existence of the *same* combination and conspiracy which was in issue here; and (c) that they constituted an *admission* of guilt—the final decree of dissolution upon the *facts* stated therein having been *consented and agreed* to by the defendants. (See Assignment No. 22 and discussion, infra, p. 257.)

POINT XIII. While R. S. Waddell was under cross examination, paragraph Eleventh of the amended declaration was read *in extenso* to him, and he was asked whether he gave his attorneys the information upon which it was based, to which he replied that he did and would be glad to state them to the jury. The cross-examiner did not give him this opportunity. Upon re-direct he

was asked to state what this information was, but the court refused to permit him to do so, which refusal is assigned as error. Plaintiff contends that this comes within the familiar rule that where a part of a conversation is put in evidence by one party, the other is entitled to put in the remainder. The harmful character of the inquiry by the cross-examiner was, primarily, to discredit the witness and his counsel before the jury; and in any event, plaintiff was entitled, as a matter of right, to take advantage of the opportunity furnished by the defendants to offer evidence and bring out facts which might not otherwise have been admissible. (See Assignment No. 23 and discussion, infra, p. 267.)

POINT XIV. The defendants took the depositions of about 75 persons who had at some time been customers of the plaintiff, to all of whom they propounded a lengthy question, the material substance of which was that in a bill of particulars filed by plaintiff it had stated that he (said customer) was one of those who had been "*induced* by the defendants to abandon the purchase of powder from the Buckeye Powder Co." The question then recited the names of 28 persons as defendants and co-conspirators, after which there followed the inquiry whether any one of such persons "ever *induced* you not to purchase powder of the plaintiff." There was nothing in the question to explain to the witness the *character* of the "inducements" which were *charged* by the plaintiff (such as by tying up his trade by an exclusive contract, or by offering him lower prices, or by employing miners to stir up strife and cause plaintiff's powder to be rejected, etc., etc.) and the witness naturally understood the inquiry to relate to *personal importunity* only and of course answered in the nega-

tive. The Court admitted all this testimony over the objection of the plaintiff. The plaintiff contends (a) that the question itself was in the nature of a hypothetical question which did not embrace all the facts upon which the hypothesis was based; and, (b) that the answer of the witness was a mere conclusion, because given without the slightest intimation of the methods by which it was charged that he was "induced" to abandon plaintiff; and (c) that it was exceedingly harmful because repeated so frequently as to give the impression of a complete and final answer to plaintiff's charges. (See assignment No. 24 and discussion, infra, p. 270.)

POINT XV. Assignments Nos. 25, 26, 27, 28, relate to the instructions of the court with respect to damages claimed by plaintiff. These become important because if the jury could have found under the instructions of the Court that the defendants had been guilty of the things declared unlawful by Section 2 (to which they were confined by the charge of the Court), they might well have reached the conclusion under the limitations which were put upon them with respect to the proof necessary to establish damages, that the plaintiff had suffered no damage. Plaintiff contends that it was entitled to recover nominal damages, in any event; and also all damage resulting as the natural and proximate consequence of the unlawful acts, and that such damages were recoverable not only for the loss of value of the physical assets, but also good will, and for loss of profits on powder manufactured as well as powder which it was prevented from manufacturing—all profits to be estimated in accordance with what would have been a fair and reasonable profit under normal competitive conditions, viz., 30 cents per

keg. The Court withdrew from the consideration of the jury the claim of damages on account of good will, and also for loss of future profits. It withdrew from their consideration all evidence that 30 cents was a fair profit, and told them that unless the evidence showed to their satisfaction that plaintiff had made some profit, at some time, on powder actually manufactured and sold, they could allow nothing as damages (See Assignments and discussion, infra, p. 278.)

POINT XVI. Unless the judgment is set aside and the errors corrected, the 7th Section of the Sherman Act is a dead letter, for even if it were possible to establish the unlawful conduct, it would be impossible to prove damages. (See Assignments Nos. 1 and 2, and discussion, infra, p. 305.)

The Charge of the Court—Erroneous Theories.

It will be observed that many of the errors assigned relate to the charge which is always a most important factor in determining a verdict. In this case it was particularly so because of the great length of time occupied in the trial, and the vast amount of evidence that was introduced. Under such circumstances the instructions must not only be weighty, but conclusive.

The errors were mainly due to the following theories held by the Court:

First. The theory that every allegation must be proved by *direct* and *positive* evidence—nothing being left to inference. (See Points I, II, VIII, IX, X.)

Second. The theory that the defendants were possessed of *primary,* or *pioneer,* rights to the trade in explosives by reason of the supremacy which they had gained, and that they were justified in *maintaining* these rights and that supremacy, re-

gardless of the injury which might result to others in so doing. (See Points V, VI, XI, XV.)

Third. The theory that what an *individual* competitor might lawfully do as affecting trade and commerce, might lawfully be done by a *combination* of individuals; and that the plaintiff was limited in its right to complain of the conduct of the defendants, by reason of the knowledge that its chief sponsor, Mr. R. S. Waddell, had gained while in their employ, concerning the methods, policies and practices which they had long followed with competitors. (See Points IV, V, VI, IX.)

Errors due to the Theory that every Allegation Must be Proved by Direct and Positive Evidence—Nothing being left to Inference.

It will be found that underlying most of the errors committed by the Trial Court, both during the trial and in its charge, the court was influenced by the theory that plaintiff must prove its charges by *direct and positive* evidence. It insisted upon the plaintiff catching the culprit in the *very act.* It left nothing to be *inferred* from specific acts or transactions which were put in evidence. It brushed aside from the consideration of the jury the most important of plaintiff's charges—the proofs with respect to some of them at least, being overwhelming.

That this was an erroneous theory has been settled by the following cases which have arisen under the anti-trust act:

Mr. Justice Day in *Eastern States Lumber Association vs. United States,* 234 U. S., 600, 612, says:

> "But it is said that in order to show a combination or conspiracy within the Sherman Act *some agreement* must be shown under

> which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may *be inferred* from the things actually done."

In *Hale v. Hatch, etc.*, 204 Fed., 433, in the Circuit Court of Appeals for the Second Circuit, the plaintiff, who was a coal dealer at Hartford, sued under the 7th Section of the Sherman Act to recover damages from the defendants for forcing him into bankruptcy, by combining and pursuading wholesale dealers in coal to boycott him, by refusing to sell him coal, thus making it impossible for him to take orders or to fill those already taken. The court says:

> "It is true that the evidence is to a large extent circumstantial. The defendants did not write out and formally pass a resolution declaring that Hale was demoralizing the trade by selling at lower prices than the association deemed reasonable and that, therefore, they would not deal with him themselves or with any wholesaler who sold him coal. Conspirators do not work in this way. They do not advertise their purpose openly, their methods are secret, sinister and clandestine. It is rare, indeed, that a conspiracy is proved by direct evidence. In a vast majority of cases circumstantial evidence is relied on. Such evidence is as efficacious as direct if it establishes the proposition that the defendants, or some of them, had a common purpose to violate the law which they succeeded in accomplishing (*Marrash v. United States*, 168 Fed., 225, 229)."

See also *Ware-Kramer v. American Tobacco Co.*, 180 Fed., 160, 169.

The erroneous Theory that what an Individual Competitor might lawfully do, might lawfully be done by a Combination of Individuals.

This distinction between the privileges which the law allows to an individual competitor and which it denies to a combination of individuals, was one which was entirely lost sight of by the Court during the trial, and is expressly repudiated in its instructions to the jury.

For example:

If the plaintiff, perchance, wittingly or unwittingly, happened to make a lower price to some customer than the defendants were making in that same district, he was guilty of "cutting prices"—and the defendants were justified in "meeting the cut", and in fact cutting prices to so low a point that it was impossible for plaintiff to compete with them. (See infra, p. 89.)

If plaintiff employed miners who were experienced in the shooting of powder to act as demonstrators of its products in the mines of its various customers, the defendants were justified in employing miners to induce their fellow workmen to boycott plaintiff's powder. (See infra, p. 222.)

In the *Eastern States Lumber Association* case, 234 U. S., 600, 614, the distinction between the right of an individual to carry on his business in accordance with his own desires, and the restrictions placed upon a combination of individuals, is thus clearly stated:

> "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in *Grenada Lumber Co. v. Mississippi*, 217 U. S., 433, 440, 'when the plaintiffs-in-error *combine* and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is

presented. An act harmless *when done by one* may become a public wrong *when done by many* acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or *to the individual* against whom the concerted action is directed.'

POINT I.

The Eastern Dynamite Company and the International Smokeless Powder & Chemical Company, being parties to the unlawful combination, were liable for all the overt acts committed by any other party thereto, and for all damages suffered by reason thereof; and it was error to direct the jury to return a verdict in favor of said defendants.

The Court instructed the jury as follows, which is assigned as Error No. 3 (Trans., p. 3199):

> "The suit is brought by the Buckeye Powder Company and has proceeded to trial against three defendants. The evidence, however, fails to support any participation by the Eastern Dynamite Company and the International Smokeless Powder and Chemical Company, and my instructions to you are that you return a verdict of no cause of action in their favor."

The sufficiency of the record.

The Court below took the ground that it could not determine the correctness of the ruling of the trial court with respect to this assignment (as well as the fourth assignment), for the reason that—to quote from the opinion (Trans., p. 3186, fol. 9558)—

> "Only selected portions of the evidence are before us, and the district judge very properly called attention to this fact when he granted the exception now being considered, saying: 'In my judgment this exception to be considered should have behind it the entire record, but it is allowed and signed that the plaintiff may have the benefit of it in case I am in error in that view.'"

And, with respect to the fourth assignment (infra, p. 131) the Court said (see Trans., p. 3187, folio 9559):

> "The plaintiff complains also, because the trial judge required it to elect whether it would insist before the jury on a violation of Sec. 1 of the Anti Trust Act, or on a violation of Sec. 2. Manifestly the correctness of this ruling also can only be satisfactorily reviewed upon the whole record and what we have just said applies to this assignment as well."

The court below is in error in saying that the District Judge called attention to his views regarding the necessity for the whole record "when he *granted* the exception now being considered."

On the contrary, the record discloses the exactly opposite to be the fact.

It was not until after the parties had spent over nine months in making up a bill of exceptions, during which time the defendant proposed 813 amendments to plaintiff's proposed bill, and it was *after* the trial judge had heard and finally settled all the questions which the parties themselves could not agree upon, and *after* the final Bill of Exceptions, as thus settled, had been submitted to him for his signature, that he made the entry concerning the record above referred to by the cort below. (See "Docket Entries", p. xii.)

It was not when he *granted* the exception, but when he *signed* the Bill of Exceptions.

The record shows that when he granted the two exceptions, it was without any restrictions whatever, as follows:

Exception to Assignment No. 3 (See Transcript, page 2518, fol. 7552):

> "MR. ABBOTT: If the court please, we desire to enter an exception to the instruction of the court to the jury that they return a verdict in favor of the Eastern Dynamite Company and the International Smokeless Powder Company.
>
> "THE COURT: You may have it."

Exception to Assignment No. 4 (See Transcript, page 2433, fol. 7299):

> "To which ruling of the court, the plaintiff, by its counsel, then and there excepted, and said exception *was allowed.*"

The Bill of Exceptions is virtually an Agreed Statement of Facts.

The Court below says: "Only selected portions of the evidence are before us."

This statement is correct only in the same sense that it might be said of all other bills of exceptions, and is in accordance with the practice recommended by this Court:

A bill of exceptions should contain only so much of the evidence as is necessary to present the legal questions raised, and the practice of inserting more than this has been frequently condemned by this Court.

Lincoln vs. Claflin, 7 Wall, 132;
Evans vs. Patterson, 4 Wall., 224:

Mr. Justice Field, in *Lincoln v. Claflin,* 7 Wall., 132, 136, said:

"A bill of exceptions should only present the rulings of the court upon some matter of law —as upon the admission or exclusion of evidence—and should contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearing of the rulings upon the issues involved. If the facts upon which the rulings were made are admitted, the bill should state them briefly, as the result of the testimony; if the facts are disputed, it will be sufficient if the bill allege that testimony was produced tending to prove them. If a defect in the proofs is the ground of the exception, such defect should be mentioned, without a detail of the testimony. Indeed, it can seldom be necessary for the just determination of any question raised at the trial to set forth the entire evidence given; and the practice in some districts —quite common of late—of sending up to this court bills made up in this way—filled with superfluous and irrelevant matter—must be condemned. It only serves to throw increased labor upon us, and unnecessary expense upon parties. If counsel will not heed the admonitions upon this subject, so frequently expressed ed by us, the judges of the courts below, to whom the bills are presented, should withhold their signatures until the bills are prepared in proper form, freed from all matter not essential to explain and point the exceptions."

As below shown, more than *nine months* was spent by the parties in an effort to comply with this rule. Many extensions of time for filing the bill of exceptions were applied for and granted by the Court (See Orders, etc., Trans., pp. 3098-3101; 3163, 3174, 3176.) It was found impracticable to bring up the testimony in *narrative* form, and an application was made to the Court for authority to set it out by question and answer—the defendant's counsel "agreeing and consenting" thereto—and this authority was given by the Court. (See Order, Trans., p. 3178.)

The Bill of Exceptions as finally settled, was virtually an agreed statement of facts, and the agreed recitals therein are that it contains everything "in so far as the same is necessary to determine the issues" upon this Writ of Error.

The very first paragraph of the Bill of Exceptions negatives the suggestion of the trial judge concerning the necessity of any further record. (See Vol. 1, page 43, folio 128). It is there recited that during the trial testimony was introduced and offered by the respective parties, and certain rulings were made thereon; and—

> "that the names of the witnesses whose testimony was so offered and received in evidence together with the testimony so offered and received, and the objections made thereto, and the orders of said court sustaining or refusing said offers, together with the plaintiff's exceptions taken at the time thereto, and together with the documents and records which were offered in evidence as exhibits and which were received or refused by said court, *in so far as the same is necessary to determine the issues* upon Writ of Error on behalf of the plaintiff herein, are particularly *hereinafter* set forth as follows, to wit:"

The above recitals come almost literally within those approved by this court in *Clyatt vs. United States,* 197 U. S., 207, 220 (a criminal case), except that in that case there was no *affirmative* statement in the bill of exceptions that it contained *all* the necessary testimony; following the rule laid down in *Gunnison County Commissioners v. Rollins,* 173 U. S., 255 (a civil case); and also in *Wiborg v. United States,* 163 U. S., 632.

By reference to the "Docket Entries" on pp. xi, xii, Vol. I, of the Transcript it will be seen that there was, first, a *proposed* bill of exceptions con-

sisting of four printed volumes, filed by the plaintiff on October 10th, 1914; that nine weeks later (on December 9th) the defendants filed eight hundred and thirteen (813) proposed *amendments*, consisting of 350 typewritten pages; that on January 13th, 1915, there was a hearing before the court and the bill of exceptions was partly settled, and on the following day the matter was "referred to C. S. Chevrier to adjust the differences" between the parties; that as late as February 15th, 1915, testimony was taken to determine what the record really was in certain particulars; and that the final hearing on the motion for settlement before the court, was had on March 15th, 1915; and that the final Bill was filed on March 17th, 1915.

The reference to Mr. Chevrier as above noted, was made necessary by reason of the vast number of amendments proposed by the defendants. He was a deputy clerk of the court and had the confidence of all the parties, and it was believed that he could assist the counsel as well as the Court; and this proved to be the case.

The orginal *proposed* bill of exceptions and the original proposed *amendments* thereto have been sent up to the clerk of this court for reference. It will appear therefrom that these 813 proposed amendments covered the minutest details of plaintiff's proposed bill of exceptions; but that no amendment was ever proposed *to correct the recital above quoted* from page 43 of the record, and the record as proposed and amended was certified "in so far as the same is necessary to determine the issues upon the Writ of Error." There had never been any suggestion made by the defendant, that the error now under consideration, or any other assignment of error, "to be considered should have behind it the entire record." This was an entry

made by the trial judge himself on his own initiative and after the parties themselves had agreed that the record as it had been proposed and amended contained everything "necessary to determine the issues."

The duty of the Court is very simple. It is to determine whether there is any evidence in the record which could have been properly submitted to the jury in support of this charge. If the Court finds that there was, then it does not matter how much more of the same sort there may have been, nor does it matter that there may have been other evidence of a negative character. In either such event, it would only have been more clearly the duty of the Trial Court to refer the question to the jury to determine.

Furthermore, counsel for plaintiff do not know of a single shred of anything in the way of testimony or exhibits which was before the Trial Court having the remotest bearing on any issue presented by this Writ of Error that was not before the Court below, and is not now before this Court. If there be any such, it has never been called to the attention of counsel for plaintiff by counsel for defendants, nor by the Trial Court. On the other hand, we believe that the record as it now stands contains hundreds of pages of testimony and many exhibits which are not necessary to the determination of this Writ of Error.

But, in any event: If the record for any reason is not complete, the defendants should have applied for a writ of certiorari to send up the missing matter.

Under Rule 14, it has been held that if the record is incomplete, the dissatisfied party should ask for a certiorari, which will be readily granted when applied for in season.

United States vs. Gomez, 1 Wall. 690.

And in some cases, the court will of its own motion, direct a certiorari to supply the omission.

Sweeney vs. Lomme, 22 Wall. 208;
Union Trust Co. vs. Westhus, 228 U. S., 519.

Furthermore, the rule often announced in this court is, that—

> "Whenever the error is apparent upon the record, it is open to revision, whether it be made to appear by bill of exceptions or in any other manner."

Suydam vs. Williamson, 20 How., 427, 433;
Moline Plow Co. vs. Webb, 141 U. S., 616;
Storm vs. United States, 94 U. S., 76;
Garland vs. Davis, 4 How. 131;
Young vs. Martin, 8 Wall. 354.

Theory of the Court in Directing a Verdict.

The action of the Trial Court in directing a verdict for these two defendants was founded upon the erroneous theory that unless the record showed actual "participation" by them in some overt act, they were not liable, under the law; and that this the record did not show, as a matter of fact. This was—

(a) Erroneous in law; and
(b) Erroneous in fact.

First. Erroneous in law: Every party to an unlawful combination is liable for all the overt acts committed by every other party thereto and for all damages suffered by reason thereof.

Second. Erroneous in fact: The evidence in

the record discloses that the Eastern Dynamite Company and the International Smokeless Powder Company were members of the unlawful combination, and actually participated in monopolizing and attempting to monopolize the explosives trade, and in the benefits which accrued therefrom to the members thereof.

First. The Law—Actual Participation Unnecessary.

In *United States vs. Kissell,* 218 U. S., 601, Mr. Justice Holmes accurately described the situation here with respect to the relation of the Eastern Dynamite Company, the International Smokeless Company, and the Du Pont Powder Company, when he said that a "conspiracy is a *partnership* in criminal purposes"; and "that an overt act of one partner may be the act of all, without *any new agreement specifically directed to that act.*"

In *Nash vs. United States,* 229 U. S., 373, this rule was affirmed in the following language:

> "The Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say it does not make the doing of an act other than the *act of conspiring* a condition of liability."

In *Williamson vs. United States,* 207 U. S. 425, 447, Chief Justice White announced this same rule in relation to a conspiracy to commit the offense of subornation of perjury, as follows:

> "The conspiracy is the offense which the statute defines without reference to whether the crime which the conspirators have conspired to commit is consummated."

In the case of the *United States vs. Cassidy,* 67 Fed. 698, which was based upon an indictment against certain alleged railroad strikers, the rule is stated as follows:

"Any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto from that time as if he had originally conspired"

And further:

"Where several persons are proved to have combined together for the same illegal purpose, any act done by one of them, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence *against any of the others* who were engaged in the conspiracy."

In *United States vs. Rintelen*, 233 Fed. 793, 796, it is said:

"The chief element in a common-law conspiracy is the meeting of the minds of two or more or several persons to effect or accomplish an unlawful purpose, or a lawful purpose through unlawful means, or, as suggested by Mr. Justice Holmes in *United States vs. Kissel*, 218 U. S. 601, under the Sherman Act, it is in essence nothing more than a partnership in criminal purposes."

It may be objected that these cases are all on the criminal side of the statute; but it is the criminal conduct of the defendants as outlined in Sections 1 and 2 of the Sherman Act which is the basis of their civil liability; for Section 7 provides that a person who is injured "by reason of anything forbidden or declared to be unlawful by this act, may sue therefor," etc. If, therefore, the Eastern Dynamite Company and the International Smokeless Company were "partners" with the Du Pont Powder Company in the crime of conspiring to monopolize or attempting to monopolize the trade in explosives, then they were civilly liable, with that Company, for any

injury which the plaintiff may have suffered at its hands, whether they actually "participated" in any of the overt acts or not.

In *United States vs. MacAndrews & Forbes Company,* 149 Fed., 823, 830, which was an action on the criminal side of the statute, it was said:

> "It is to be remembered that the same facts and acts which expose violators of this statute to a civil suit also render them subject to indictment."

The general rule, as applied in all jurisdictions is that:

> "Every conspirator is liable for all overt acts illegally committed in pursuance of the conspiracy, and for the consequent loss, whether they were active participants or not."
> 8 Cyc., 657, 658.

It has been announced and affirmed in its application to the seventh section of the Sherman Act by this Court in *Lawler vs. Lowe,* 235 U. S., 522.

Also in *City of Atlanta v. Chattanooga Foundry,* etc., 127 Fed., 23, the opinion being delivered by Judge Lurton. The facts were that six corporations who were engaged in the business of making and selling cast iron pipe fittings, entered into a conspiracy for the purpose of restraining interstate trade and commerce in such commodities. The action was brought by the City of Atlanta for the purpose of recovering a sum of money alleged to have been paid in excess of the fair price of certain pipe purchased by it for use in its water system. Only two of the six corporations engaged in the conspiracy were made parties defendant. Judge Lurton said:

> "We have, then, a direct action by this

plaintiff against two of the members of this unlawful combine. *That there was no purchase made direct from either of them is of no importance.* Their guilt is as great as that of the Alabama corporation from whom the plaintiff did buy its pipe. *If the agreement between the defendants and their associates was unlawful and tortious, each is responsible for the torts committed in the course of the illegal combination.* These defendants have themselves participated in the benefits resulting from the bonus paid by the Alabama member of the association, and have no ground to complain that they have been alone sued."

Applying the above authorities to the error under discussion: If the evidence showed, or tended to show, that these two companies were members of the same general conspiracy to control explosives, of which the defendant Du Pont Powder Company, was a member, they were equally guilty with that company for anything done by it contrary to Sections 1 and 2 of the Sherman Act; and they were liable jointly with it for all damages sustained by plaintiff; **and such evidence was for the jury to weigh and pass upon, under proper instructions from the Court.**

Mr. Justice White, in *Mosheuvel vs. District of Columbia,* 191 U. S., 247, 252, stated that "the elementary law is that questions of fact are to be decided by the jury."

Chief Justice Fuller, in *Texas & Pacific Ry. Co. vs. Cox,* 145 U. S., 593, 606, said:

> "The case should not have been withdrawn from the jury, unless the conclusion followed, as matter of law, that no recovery could be had upon any view which could properly be taken of the facts the evidence *tended* to establish." (Citing *Dunlap vs. Northeastern*

Ry. Co., 130 U. S., 649; *Jones vs. East Tenn. Ry. Co.*, 128 U. S., 443.

This is so even though the court may think there is a preponderance of evidence the other way.

City & Suburban Railroad vs. Svedborg, 194 U. S., 201;
See also Choctaw etc. Railroad vs. McDade, 191 U. S., 64.

If fairminded men may honestly draw different conclusions from the evidence, the question is one of fact for the jury.

McDermott vs. Severe, 202 U. S., 600;
Baltimore & P. Railroad vs. Landrigan, 191 U. S., 461;
Atlantic & Pacific Tel. Co. vs. Philadelphia, 190 U. S., 160.

Second. The facts alleged and proved, which establish that the Eastern Dynamite Company and the International Smokeless Powder Company were parties to the conspiracy.

The Court below says (See Trans., p. 3186, fol. 9557):

"Neither of these corporations manufactured or traded in black blasting powder—which was *the particular* business the defendants were *charged* with restraining or monopolizing—and their *indirect* connection with the alleged unlawful combination was rested *wholly* on the fact that a *majority of the stock* in each was owned or controlled by the Du Pont Company. Obviously, however, this fact alone did not prove *their participation* in a conspiracy, and as there was almost

> nothing else to support the allegations, we need not take further time to discuss it."

That the Court below was wrong in its conclusion that the defendants were *charged* solely with restraining or monopolizing trade in black blasting powder, and equally wrong in its conclusion that plaintiff's proofs of this charge "rested *wholly* on the fact that a majority of the stock in each was owned or controlled by the Du Pont Company" is made clear by the following extract from the Declaration, and summary of the evidence.

Paragraph fourth of the Declaration (See Trans. pp. 4-9) describes the various steps by which the conspiracy carried out its purpose to monopolize the trade in "powder and *other* explosives," and alleges that the Du Pont Powder Company finally became possessed of a controlling interest in the capital stock of the Eastern Dynamite Company and the International Smokeless Company (with many others) and thus concludes: (Ibid., p. 8.)

> "And plaintiff further shows that by reason of the matters and things alleged and set forth in this paragraph the defendants and the various other corporations and individuals hereinbefore in paragraph Third named, acting as co-conspirators with the defendants, succeeded in establishing within themselves, and have ever since maintained a practically complete monopoly in interstate trade in powder and *other* explosives amounting to about ninety-five per cent. (95%) of said entire trade, and ever since have been and now are engaged in a combination and conspiracy to unreasonably restrain and monopolize said trade throughout the United States and foreign countries, and have suppressed competition and have fixed prices of powder and *other* explosives arbitrarily and

unreasonably, and have driven independent competitors out of business or have coerced them into a sale to or union with said unlawful combination, and have unreasonably restrained trade and commerce among the several states of the United States and with foreign nations, and have committed various other unlawful and wrongful acts as hereinafter set forth."

So that the *charge* was not that a monopoly existed in *black blasting powder* only, but in "powder and *other* explosives."

Now, as to the proofs, and whether they rested wholly on the fact that a majority of the stock in each was owned or controlled by the Du Pont Company.

The following remarks by the Trial Court in another part of its instructions to the jury shows that there was *some* evidence and is inconsistent with the instruction under consideration, for it recognizes the fact that both these defendants may have actually "participated" with the Du Pont Powder Company. (See Trans., p. 2463, fol. 7388.)

> "Of course, as the defendant had a *controlling* interest in the Eastern Dynamite Company and the International Smokeless Powder and Chemical Company, it would follow that if these two companies carried on a profitable business the defendant would be benefitted by such profits to the extent of its stockholdings in such companies, and such profits would help to make up any loss that it might sustain if it sold its powder below cost."

Therefore, even if the proofs rested *wholly* on stock control, there was evidence of "participation". But there is other and much more conclusive evidence, as set forth in the following facts:

First: That the *black powder* industry was first in the field of explosives, and that a monopoly therein was developed in the "Gunpowder Trade Association."

Second: That the *dynamite* and *smokeless powder* industries were originally distinct branches of the explosives trade, and separate from the black powder industry.

Third: That, when dynamite and smokeless explosives made themselves felt *in competition* with black powder, the interests in control of the dynamite and smokeless industries, and the interests in control of the black powder industry entered into a *combination* with each other to monopolize the entire explosives trade, and this they accomplished (a) by *agreement* with competitive interests, (b) by *purchase* of competitive interests, (c) by *co-operation* between competitive interests through an extensive system of interlocking directorates, committees and boards, and, finally, (d) by complete absorption of the legal and physical ownership and control of *all these interests* by the defendant Du Pont Powder Company.

Fourth. That among the methods used to establish and maintain the said monopoly were (a) the *apportioning* of the *trade* in these various explosives between the different competitive interests, (b) the fixing of low prices in *particular localities* where competition prevailed, (c) the fixing of prices to *specific consumers*, (d) the *tying up of the trade* of consumers by a system of *rebate contracts*, and (e) the *boycotting* of black powder customers of competitors who were also consumers of one of the other kinds of explosives.

In order to fully inform the Court concerning the relation of these two defendants to the unlawful acts charged, it is necessary to review all the evidence in the record which established or tended to establish actual as well as legal participation by them, from which it will be seen that plaintiff's charges were supported by much evidence other than that of stock ownership.

This review will be treated under two general heads:

First: The general conspiracy to monopolize powder and other explosives—how it was built up as a *voluntary* association and finally attained solidarity and legal existence as a *corporate* body in the defendant E. I. Du Pont de Nemours Powder Company.

Second: The importance and effect of dynamite and smokeless powder in their relation to the explosives industry—the history of the development of that trade, and the organization of the Eastern Dynamite Company and International Smokeless Powder Company, and their final absorption by the Du Pont Powder Company.

In the first place, it should be understood that during the period here in question, the explosives industry in the United States was divided into three great classes: First, black powder, chiefly used for commercial purposes, such as coal mining; second, smokeless powder, chiefly used for sporting and military purposes; and third, "high explosives," such as dynamite, chiefly used for rock and ore blasting.

The different interests represented by each one of the defendants originally controlled separate branches of this explosives trade; the Du Pont interests controlled the first, the International

Smokeless Company, the second; and the Eastern Dynamite Company, the third; and these three interests were finally brought together under one corporate management and control in and by the defendant, E. I. Du Pont de Nemours Powder Company, in 1903.

First. The General Powder Combination—The "Gunpowder Trade Association."

The development of the explosives business and of the "Gunpowder Trade Association," including—

(a) The "Fundamental Agreement" of 1889.

(b) Price contests and final absorption of competitors by the Association previous to 1896.

(c) The "General Understanding" or "1896 agreement"—The "Advisory Committee"—The "Compendium of Rules".

(d) The "Foreign", or "European Agreement" of 1897.

(e) Price contests subsequent to 1896 and further absorption of competitors by the Association.

(f) Incorporation of the Du Pont partnership—the "1899 Du Pont Corporation."

(g) Death of Eugene Du Pont and the entry of T. C. Du Pont and Pierre S. Du Pont as the "new management" of the Du Pont interests—Incorporation of the "1902 Du Pont Corporation".

(h) The incorporation of the defendant Du Pont Powder Company in 1903, and the acquisition by it of the actual and legal control and ownership of the stock and physical properties of members of the Trade Association.

(i) Dissolution of the Trade Association.

(j) The legal effect of these various agreements and acts.

Second. The Dynamite Industry—Its Importance and Effect in Development of the Gunpowder Trade Association—The Eastern Dynamite Company.

1. The beginning of the dynamite industry and development prior to the organization of Eastern Dynamite Company, until the actual and legal control of that company and all of its properties was acquired by the defendant Du Pont Powder Company.

2. Expansion and suppression of competition *by agreement* with competitive dynamite interests.

3. Expansion and suppression of competition *by purchase* of competitive dynamite interests.

4. Expansion *by co-operation* between dynamite and black powder interests—Sales to particular classes of consumers of explosives—The "Wilmington High Explosives Companies."

5. Black powder and dynamite interests controlled by the same men—"Interlocking Directorates".

Third. The Smokeless Powder Industry.—Its Development—The organization of the International Smokeless Powder Company, and the acquisition of the actual and legal control thereof by the Du Pont Powder Company.

Fourth. Particular Methods used by the Trade Association to Monopolize the Trade in Explosives and adopted by the Defendants to continue the Monopoly.

Particular methods and unfair practices used

by the members of the Gunpowder Trade Association in the suppression of competition, during its existence, were adopted and continued after its absorption by the Defendant Du Pont Powder Company, and applied effectively to drive plaintiff out of business. Some of these were:

(a) The "Sales Board" as the successor of the "Advisory Committee"—The "Trade Report System".

(b) Special prices to specific customers—fixing lower prices in particular localities where competition prevailed.

(c) Advancing prices after each contract was ended—The first regular price lists.

(d) Tying-up the trade by a system of contracts.

(e) Trading and exchanging contract customers—The rule of "Equities".

(f) "Respecting" contract trade.

(g) The legal effect of the contract system.

The evidence shows that by these methods, a combination was accomplished between these three great branches of the explosives industry, which was completely absorbed by the defendant Du Pont Powder Company, and all the fruits thereof retained and made use of until it had control of the total output in the following proportions (see Defendants' Exhibit A-518, Trans., p. 2957):

Of black blasting powder 77.10% in 1903 to 63.74% in 1908; dynamite 80.77% to 69.41%.

Of smokeless powder, nearly 100% (infra, pp. 85-87).

The rule is well established by the authorities that it is not necessary in order to show a viola-

tion of the Sherman Act that there should be a *complete* monopoly. It is sufficient if the acts only *tend* to that end.

In *United States v. E. C. Knight Co.*, 156 U. S. 1, Chief Justice Fuller said:

> "All the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result be a *complete* monopoly. It is sufficient if it really *tends* to that end, and to deprive the public of the advantages which flow from a free competition."

This language was quoted with approval in the *Addystone Pipe* case, 175 U. S., 237.

See also *Chesapeake & Ohio Fuel Co. v. U. S.*, 115 Fed., 610.

First. The Powder Industry—The Development of the Explosives Business and the "Gunpowder Trade Association".

The history of the explosives business in the United States and the formation and maintenance of the Gunpowder Trade Association shows that an unlawful monopoly of interstate trade in "powder and other expolsives" was built up and maintained by voluntary co-operation between manufacturers and vendors thereof, until the legal and actual control of the business and properties of nearly all of the members of said association (including the Eastern Dynamite Company and the International Smokeless Powder Company) was brought together under one corporate control, in the defendant, Du Pont Powder Company.

The manufacture of explosives in the United States was started in 1802, by a partnership known as the E. I. Du Pont deNemours Company, who occupied the field exclusively until

1820, when the Laflin & Rand Powder Company came into it. In 1850 the Hazard Powder Company entered. These three concerns operated in competition until in 1876, when the Du Pont partnership purchased all the stock of the Hazard Company. (P. S. Du Pont Trans. pp. 44-45.)

Some time after the Hazard Powder Company came into existence, others entered the explosives field, until on December 19, 1889, the following 12 companies were operating as separate organizations, in various parts of the United States.

E. I. Du Pont deNemours & Co., a partnership, Delaware;

Hazard Powder Company, Connecticut;
Laflin & Rand Powder Company, New York;
Oriental Powder Mills, Maine;
American Powder Mills, Massachusetts;
Austin Powder Company, Ohio;
Miami Powder Company, Ohio;
King Powder Company, Ohio;
Ohio Powder Company, Ohio;
Sycamore Powder Company, Tennessee;
Lake Superior Powder Company, Michigan;
Marcellus Powder Company, New York.

For many years previous to the 19th day of December, 1889, these various companies had cooperated together to control the gunpowder trade of the United States; (Haskell Trans. p. 1680); had organized and carried on an Association under various styles which held meetings at stated intervals and established a set of rules known as the "Compendium of Rules" to regulate their relations with each other and with the trade, and fixed the prices which its members were to charge for their product. (Waddell, Trans., pp. 710-711).

(a) THE "FUNDAMENTAL AGREEMENT OF 1899."

This Association continued in a more or less effective manner, until on December 19, 1889, a written agreement, known as the "Fundamental Agreement", was executed by the above named 12 companies, to become effective on Jan. 1, 1890. (See Plaintiff's Exhibit 1116, Trans., pp. 2637-2654.)

The agreement recited that it was executed

> "for the purpose of regulating in a convenient and desirable manner the business of the parties hereto, in such of their sales of powder as are treated in this agreement; for the purpose of avoiding unnecessary loss in the sale and disposition of such powder by *ill regulated or unauthorized competition and underbidding by* the agents of the parties hereto, and for the purpose of protecting consumers and the public from unjust fluctuations in prices and from unjust discriminations." (Ibid., p. 2639, folio 7915.)

It divided the United States into seven districts, according to convenient geographical boundaries, one of which was known as the "Neutral Belt," and embraced the Rocky Mountain States and territories. (Ibid, pp. 2640, 2642.)

The whole trade in gunpowder in the United States was divided up and the amount which each party was entitled to claim as its share in the future yearly business was allotted; so many kegs of sporting powder and so many kegs of blasting powder to each. (Ibid, pp. 2643, 2644.)

At the end of each year the parties were required to submit sworn statements of their sales as a basis for the "adjustment or clearance of such differences, in money values" as might be found to exist, and an accounting was required to

be made for oversales or undersales, above or below the quota allotted. If a member had sold more than its allotted quota it was required to pay a penalty for oversales, which was distributed to those members who had sold less than their quota (Ibid, pp. 2645-2646).

Officers and committees were provided for to manage the affairs of the Association; annual meetings were to be held, and a "Board of Trade" was to be elected to act for the Association *ad interim*. This Board was authorized "to fix prices and to vary or change the same at any time and for any place," and to enforce the rules of the Association (Ibid., p. 2652). Certain agreements already in existence between some of the members of the Association and the California Powder works relating to the trade of the "Neutral Belt" and of the Pacific Coast were continued in existence.

(b) PRICE CONTESTS AND FINAL ABSORPTION OF COMPETITORS BY THE ASSOCIATION PREVIOUS TO 1896.

Shortly after the making of this agreement, the following other companies commenced operations in the manufacture and sale of gunpowder:

The Equitable Powder Company,
The Chattanooga Powder Company,
The Phoenix Powder Company,
The Southern Powder Company.

These companies were not members of the Association and "their injection into the powder business at the time they commenced operations caused the demoralization which existed for the next few years." (Haskell, p. 1697, folio 5089.)

The minutes of the meetings of the Association

during this period show that it had difficulty in enforcing strict observance by its members of the prices which were fixed from time to time. (See Government's Exhibits 101, 101a, 101b, 102, in Plaintiff's Exhibit P-3; also Haskell, Trans., p. 1765.)

General permission was given to the associate members to *defend* their trade and the evidence shows that a contest was conducted vigorously between those companies that were in the Association, acting as a unit, and those that were on the outside. Prices went down in the district where the "outside" competitors operated from $1.50 per keg to as low as 80 cents, and in a few cases to 75 cents (R. S. Waddell, Trans., p. 1011; also Haskell, Trans., pp. 1616, 1619, 1733, 1764-1765).

The contest extended from the early 90's until 1896, when all the independents were "rounded up" (R. S. Waddell, Trans., p. 1011).

At a meeting of the Association on May 21, 1896, the Equitable, the Chattanooga and the Phoenix Companies were taken into the Association, and given an allotment or quota of the trade on a basis similar to that of the other members. (Trans., pp. 1896-1900.) The Southern Powder Company was jointly purchased by members of the Association and absorbed and dissolved soon after. (Trans., pp. 1693-1694.) The others were likewise purchased in whole or in part by members of the Association, but they maintained their identity as separate organizations and were separately represented at the meetings of the Association. (See Government's Exhibits 109, 110 in Plaintiff's Exhibit P-3, at pp. 965, 967.)

(c) THE "GENERAL UNDERSTANDING" OR "1896 AGREEMENT"—THE ADVISORY COMMITTEE.

A new agreement was formulated called the "General Understanding," which was in the nature of an amendment to the "Fundamental Agreement" (Haskell, Trans., pp. 1623-1635), and instead of the "Board of Trade" an "Advisory Committee," with similar powers was established. Only one copy of the 1896 Agreement was prepared, which was left in the custody of the Advisory Committee, and a summary of its provisions, called "Abstract" was prepared for the use of each of the parties. (See Ibid, Government Ex. 110, in P-3 at p. 971.)

The duty of the "Advisory Committee" was to recommend prices to the members of the Association (Haskell, Trans., p. 1669). Also there was a "Special Committee" whose duty it was to make special prices in the interim between the meetings of the "Advisory Committee." (Ibid, p. 1670.)

(d) THE "FOREIGN" OR "EUROPEAN AGREEMENT OF 1897."

In 1897, an agreement was entered into between the "American Factories" and the "European Factories" engaged in the manufacture of explosives which *divided the trade of the world* between them.

The following were the "American Factories", who were parties to the agreement:

E. I. Du Pont deNemours & Company.
Laflin & Rand Powder Company.
Eastern Dynamite Company.
Miami Powder Company.
American Powder Mills.
Aetna Powder Company.

Austin Powder Company.
California Powder Works.
Judson Dynamite and Powder Company.

And the following were the "European Factories":

The Vereinigte-Koln-Rottweiler Pulverfabriken of Cologne.

Nobel Dynamite Trust Company Limited of London. (See Trans., pp. 1657-1658.)

The salient conditions of this agreement were as follows (Haskell Trans., pp. 1656-1665):

1. The American Factories were assigned all the territory embraced in the United States, Mexico, Central America and the Islands of Carribean Sea. The European factories were assigned all of Europe and other foreign territory. South American states were to be joint territory.

2. Neither party was to build any plant in the territory assigned to the other and a plant which had been started by the foreign interests at Jamesburg, N. J., was to be abandoned.

3. Each party agreed not to build plants in the other's territory for the manufacture of black blasting powder, and smokeless powder.

4. The American interests were to purchase detonators of the foreign interests.

5. There was a reciprocal provision that neither party should sell explosives in the territory assigned to the other.

6. There was a reciprocal provision whereby if the American factories received an inquiry for European smokeless powder, military powder, it was necessary for them to ask the European factories for the price to be charged, and vice versa.

7. Two chairmen were to be selected, one to represent the American interests and the other the European interests. Mr. Eugene du Pont was selected as the first American Chairman, and after his death Mr. T. C. du Pont was selected.

8. A fund was established to carry out its provisions, and payments were made into his fund by the American factories.

9. The agreement was to continue for ten years.

This agreement was in full force, and its provisions were carried out until in 1906, when Mr. T. C. du Pont went abroad and paid a very considerable sum of money for its cancellation, and it was torn up and burned in his presence. (T. C. du Pont, p. 214; also Haskell, p. 1665.)

(e) PRICE CONTESTS SUBSEQUENT TO 1896 AND FURTHER ABSORPTION OF COMPETITORS BY THE ASSOCIATION.

Other competitors entered the field—notably the Birmingham Powder Company, located near Birmingham, Alabama, and the Indiana Powder Company near Terre Haute, Ind., but they were soon made the object of fierce contests, and were ultimately taken over and brought into the combination.

The King Powder Company, while it was a member of the Association was more or less of a disturbing factor, in that it was not at all times submissive to the rules. In 1901 an agreement was made between the 1899 Du Pont Company and the Laflin & Rand Powder Company, on the one hand, and the King Powder Company, on the other, whereby the product of the latter company was to be sold by the former companies; and thereupon the King Mercantile Company was organized as a selling company through which this business

was to be handled. This agreement was to run for 25 years and was operated under until in 1906, when it was canceled by payment to the King Powder Company of $100,000 on account of advice that the contract was illegal. (Haskell, Trans., pp. 1641, 1666-1667, 1773, 1774.)

When this contract was made, the King Powder Company withdrew from the Gunpowder Trade Association. (Haskell, p. 1769, folio 5307.)

But after the time of the "General Understanding" the Gunpowder Trade Association became active and vigorous in its control of the powder trade, until it was succeeded by the E. I. Du Pont de Nemours Powder Company in 1903. It finally died and was buried without obsequies in June, 1904, after "it had outlived its usefulness" as stated by Mr. Haskell, its prime organizer and most active spirit after the "General Understanding" was entered into. (See Trans., p. 1651, fol. 4951.) A general advance in prices all over the country was immediately made, amounting to 25 *cents per keg.*. (Test of Haskell, Trans., p. 1711, fol. 5131.)

(f) Incorporation of the Du Pont Partnership—the "1889 Corporation."

In 1899, the E. I. Du Pont de Nemours & Co., a partnership, was dissolved, and a corporation of the same name was organized, with a capital stock of $2,000,000, which took over all the partnership interests. This corporation will hereafter be referred to as the "1899 Corporation." Its stockholders were the same persons who were formerly interested in the partnership, and consisted of—

Eugene Du Pont, owning 20 per cent.;
Col. H. A. Du Pont, owning 20 per cent.;
Alexis I. Du Pont, owning 20 per cent.;

F. D. Du Pont, owning 20 per cent.;
Alfred I. Du Pont, owning 10 per cent.;
Charles I. Du Pont, owning 10 per cent.

(g) Death of Eugene Du Pont and the entry of T. C. Du Pont and Pierre S. Du Pont as the "new management" of the Du Pont interests—Incorporation of the "1902 Du Pont Corporation."

This corporation continued its existence until the spring of 1902, when Eugene Du Pont, who was its president and manager, died. None of the remaining stockholders cared to take active charge of the business, and all except Alfred I. Du Pont decided to sell out their interests. Mr. Thomas Coleman Du Pont, and Mr. Pierre S. Du Pont, neither of whom up to that time had been connected with the business, were invited to join Alfred I. Du Pont, and these three proceeded to acquire these interests.

The first step in taking them over was the organization of another corporation of the same name except that the "&" was omitted, which will hereafter be designated as the "1902 Corporation." Very shortly afterwards the 1899 corporation was dissolved and the name of the 1902 corporation was changed so as to include the "&," taking the same title that the 1899 corporation had yielded. T. C. Du Pont was elected its president, Alfred I. Du Pont, vice-president, and Alexis I. Du Pont, secretary. The 1902 corporation took over all the assets of the 1899 corporation, paying therefor $24,000,000—$12,000,000 being paid in 4 per cent. notes, and $12,000,000 in stock of the 1902 corporation. The balance of the capital stock remained unissued until a short

time later, when $1,000,000 more was issued and sold for cash. (P. S. Du Pont, Trans. pp. 45-59.)

By agreement between the stockholders of the 1899 Corporation, and T. C., Alfred I. and P. S. Du Pont, these three gentlemen received $8,000,000 of the stock of the 1902 Corporation, which had been issued in payment for the property of the 1899 corporation, and thereby they came *into actual voting control of the 1902 corporation, which control they have since retained.* (P. S. Du Pont, Trans., 66, 86-88.)

The 1902 corporation continued thereafter to conduct the business until in August, 1903, at which time it sold all its property and business to the E. I. Du Pont de Nemours Powder Company. (P. S. Du Pont, Trans., p. 63.)

But in the meantime the 1902 corporation caused a series of corporations to be organized, in which it retained a controlling interest, by means of which it acquired complete or controlling interests in other explosives companies, in which it had hitherto had only minority interests.

The first of the series was the DELAWARE SECURITIES COMPANY, which acquired all the remaning capital stock of the Laflin & Rand Powder Company which had not already been acquired by the 1902 corporation through the purchase of the assets of the 1899 corporation. The Laflin & Rand Company was at this time a large stockholder in the following companies, all of which were at that time members of the Gunpowder Trade Association (P. S. Du Pont, Trans., pp. 83, 89):

The Birmingham Powder Company,
The Chattanooga Powder Company,
The Eastern Dynamite Company,
The Fairmount Powder Company,

The Laflin Powder Manufacturing Company,
The Lake Superior Powder Company,
The Mahoning Powder Company,
The Marcellus Powder Company,
The Monarch Powder Company,
The Oriental Powder Mills,
The Phoenix Powder Company,
The Indiana Powder Company,
The Northwestern Powder Company.

The reason given by P. S. Du Pont for deciding to take over the Laflin & Rand Company was that that company was a minority owner of a large amount of stock in various corporations in which the 1902 Du Pont corporation also held a minority interest. It was the desire of the management to vest a *controlling* interest in all these corporations, in the Du Pont Company. By acquiring the Laflin & Rand Company the 1902 Du Pont corporation acquired this desired controlling interest (Trans., pp. 104-105). He did not regard this control as absolutely *necessary* but very *advisable*. (Ibid, p. 107. See also Trans., pp. 661-662.)

By reference to Plaintiff's Exhibit 1095 (Trans. pp. 2623-2625; P. S. Du Pont, Trans. pp. 661-664), the effect of the final absorption of the Laflin & Rand Co. was to tremendously centralize the *sources of supply* in the hands of the Du Pont interests. This testimony shows that on March 1, 1902, when T. C. Du Pont, P. S. Dupont and Alfred I. Du Pont acquired control of the Du Pont interests, these interests separately owned only 11 plants, and the Laflin & Rand Company separately owned 10 plants, and that they jointly owned 35 plants. Through the Delaware Securities Company, which these three gentlemen organized, all the stock of the Laflin & Rand Company was ac-

quired by the Du Pont interests, and these 57 plants were consolidated under one legal ownership and control in the Defendant Du Pont Company. It added 8 more by purchase and 10 more by construction, during the period after plaintiff was in business—thus giving it a total of 74 plants.

Many of these plants were for the manufacture of *dynamite*.

The effect of the alliance between the Laflin & Rand Powder Company and the Du Pont Company, and the *policy* carried out with respect to *dynamite* as well as powder, is well illustrated by the correspondence set forth, infra, pp. 66-67.

The next corporation in the series was the DELAWARE INVESTMENT COMPANY, which acquired all the capital stock of the Moosic Powder Company with mills located in Pennsylvania. (P. S. Du Pont, p. 83.)

The next was the CALIFORNIA INVESTMENT COMPANY, which acquired all the stock of the Judson Dynamite & Powder Company with mills located in California. (P. S. Du Pont, Trans., p. 83.)

(h) THE INCORPORATION OF THE DEFENDANT DU PONT POWDER COMPANY IN 1903, AND THE ACQUISITION BY IT OF THE ACTUAL AND LEGAL CONTROL AND OWNERSHIP OF THE STOCK AND PHYSICAL PROPERTIES OF MEMBERS OF THE TRADE ASSOCIATION.

After the foregoing corporations had succeeded in their purpose of acquiring the various interests above stated, the way was cleared for the combining of these interests under one management, and the final corporation in the series, the E. I. DU PONT DE NEMOURS POWDER COMPANY

(defendant), was organized on the 19th day of May, 1903. Its purpose is thus stated by P. S. Du Pont (Trans., pp. 84, 108, 668):

> "The E. I. Du Pont de Nemours Powder Company was organized under the laws of the State of New Jersey on May 19, 1903, for the purpose of consolidating into one corporation the numerous interests of the E. I. Du Pont de Nemours & Company, which corporation and its predecessor, a partnership of like name, had been engaged in the manufacture and sales of explosives for over one hundred years, having started business in the year 1802."

Mr. Haskell used the expressive phraseology in describing the purpose to be "to bring together under one corporate entity a number of separate units owned by the same owner"; and further that this it proceeded to do after its organization "just as quickly as it could" (Trans., p. 1650, fol. 4948).

It was capitalized at $50,000,000 of which $25,000,000 was common and $25,000,000 was preferred. Of this amount $30,200,000 par value was issued to the 1902 corporation and by it retained in its treasury.

T. C. Du Pont, P. S. Du Pont and Alfred I. Du Pont, thus became, *by reason of their control of the stock of the 1902 corporation,* the absolute masters of the explosives industry of the United States as formerly represented by the Gunpowder Trade Association except as shown below. (T. C. Du Pont, Trans., p. 228; P. S. Du Pont, Trans., pp. 87-88; Haskell, 1692.)

It was their original plan to have this final Du Pont Company (the defendant) take over only the *stocks* of the various corporations (Ibid, p. 666) but later this plan was changed and it eventually

acquired all their physical assets, and the various corporations whose stocks it had acquired were dissolved. (Ibid, p. 108.)

At the time these various companies were acquired by the Powder Company all of the *subsidiary companies* that belonged to or were used by any of them were acquired also (Haskell Trans., p. 1695).

A total of between 100 and 110 different companies, including subsidiary companies, engaged in some part of the explosive business, which were eventually acquired by the Du Pont Powder Company when it came into existence, were afterwards dissolved (Moxham Trans., pp. 135, 138).

See also the following exhibits: (Plaintiff's Exhibit 1171, Trans., p. 2665; Exhibit 1176, p. 2669; Ex. 1177, p. 2670; Ex. 1185, p. 2672; Ex. 1187, p. 2674; Ex. 1205, p. 2678).

(i) Dissolution of the Trade Association.

The Association was finally dissolved on June 30, 1904, **because "it had outlived its usefulness"** (Haskell, p. 1651, folio 4951).

It had remained intact and held its meetings continuously until this date.

The companies not entirely absorbed by the defendant Du Pont Company were still bound to it by large stock interests or by agreement. These were (Haskell, Trans., pp. 1642-1644):

The King Powder Company,
The Miami Powder Company,
The American Powder Company,
The Aetna Powder Company,
The Equitable Powder Company,
The Austin Powder Company.

While the last two continued to operate under

separate management their stock was owned by the defendant Du Pont Company in the following proportion:

The Equitable Powder Co. 49%,

The Austin Powder Co. 33%.

The entire product of the King Powder Company was still *controlled* by the Powder Company, under the contract with the King Mercantile Company which continued in existence until in 1906. (Ibid., p. 1643; see also supra pp. 52-53.)

The Miami, American and Aetna Companies continued to be affiliated with the Powder Company through the Sullivan-Fay agreement (See *infra*, p. 75) until in March, 1905 (Ibid., p. 1644).

Judge Lanning, in the "Government Case" (at 188 Fed., 152) said:

> "It is a significant fact that the trade association, organized under the agreement of July 1, 1896, was not dissolved until June 30, 1904. It had been utilized until that date by Thomas Coleman Du Pont, Pierre S. Du Pont and Alfred I. Du Pont in suppressing competition and thereby building up a monopoly. Between February, 1902, and June, 1904, **the combination had been so completely transmuted into a corporate form that the trade association was no longer necessary.** Consequently the trade association was dissolved, and the process of dissolving the corporations whose capital stocks had been acquired, and concentrating their physical assets in one great corporation, was begun. Before the plan had been fully carried out this suit was commenced. The proofs satisfy us that the **present form of the combination is no less obnoxious to the law than was the combination under the trade association agreement,** which was dissolved on June 30, 1904".

(j) THE LEGAL EFFECT OF THE VARIOUS ACTS AND AGREEMENTS ABOVE SET FORTH.

The foregoing evidence presents a state of facts similar to that presented in the *Standard Oil* case (221 U. S., 1, 32-40) which, briefly summarized, were that sundry individuals, operating in the business of refining crude oil originally as partnerships, finally brought these interests together in a corporation known as the Standard Oil Company of Ohio—the members of the various partnerships becoming in proportion to their prior ownership stockholders in the corporation; and by forcing their competitors to join with them or by driving them out of business, they gradually absorbed them, willingly or unwillingly; and as soon as the complete mastery of the oil industry had been attained, the Standard Oil Company of New Jersey came into being, took over the actual and legal control of these various properties, and brought them under one corporate management.

Chief Justice White (p. 76) regarded it as conclusive that the agreements entered into between the members of the combination was evidence of—

> "An intent and purpose to *exclude others*, which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which on the other hand necessarily involved the intent to drive others from the field and exclude them from their right to trade and thus accomplish the mastery which was the end in view."

See also *Standard Sanitary Mfg. Co. vs. United States*, 226 U. S., 20, 47.

Judge Lanning, speaking for the Circuit Court

of Delaware in the "Government Case" against these defendants, recognized the similarity of the facts to those recited in the Standard Oil Case and said (See 188 Fed. at p. 151):

> "The recent decisions of the Supreme Court make it equally clear that a combination cannot escape the condemnation of the anti-trust act merely by the form it assumes or by the dress it wears. It matters not whether the combination be 'in the form of a trust or otherwise,' whether it be in the form of a trade association or a corporation, if it arbitrarily uses its power to force weaker competitors out of business, or to coerce them into sale to or union with the combination it puts restraint upon interstate commerce, and monopolizes or attempts to monopolize a part of that commerce, in a sense that violates the anti-trust act."

His resume of the facts found in that case show that they were almost identical with those here presented (Ibid., p. 145):

> "All *the advantages* of the *trade association* agreement *were now much better secured* by the series of corporate transmutations that had followed the introduction of T. C. Du Pont and Pierre S. Du Pont into the explosive business. Between 1902 and the commencement of this suit in July, 1907, many of the corporations whose property and business had been acquired by the above-mentioned methods were dissolved, and thereby the relations of the combined companies were simplified and the assurances of the perpetuity of their power were increased."

And also (ibid., pp. 151-152):

> "The record of the case now before us shows that from 1872 to 1902, a period of 30 years, the purpose of the trade associations had been to dominate the powder and explosives trade

in the United States, by fixing prices, *not according to any law of supply and demand*, for they arbitrarily limited the output of each member, but according to *the will of their managers*. It appears, further, that although these associations were not always strong enough to control absolutely the prices of explosives, *their purpose* to do so was never abandoned. Under the last of the trade association agreements—the one dated July 1, 1896, and which was in force until June 30, 1904—the control of the combination was firmer than it had before been. Succeeding the death of Eugene Du Pont in January, 1902, and the advent of Thomas Coleman Du Pont and Pierre S. Du Pont, the attempt was made to continue the restraint upon interstate commerce and the monopoly then existing by vesting in a few corporations, the title to the assets of all the corporations affiliated with the trade association, then dissolving the corporations whose assets had been so acquired, and binding the few corporations owning the operating plants in one holding company, which should be able to prescribe policies and control the business of all the subsidiaries without the uncertainties attendant upon a combination in the nature of a trade association. That attempt resulted in complete success.

"Much the larger part of the trade in black and **smokeless** powder and **dynamite** in the United States is now under the control of the combination supported by the 28 defendants above named. That combination is the successor of the combination in existence from 1896 to June 30, 1904.

He summarizes the facts which he considers sufficient to establish the relationship between these parties (Ibid., pp. 148-149), and concludes:

"It is clear that these 28 defendants are associated in a combination for carrying on interstate commerce in powder and other explosives."

Second: The dynamite industry—Its importance and effect in development of the Gunpowder Trade Association—The Eastern Dynamite Company.

I. The beginning of the dynamite industry—Its development—The organization of the Eastern Dynamite Company—Suppression of competition by co-operation with powder industries.

The history of the dynamite branch of the explosives business and the manner in which it became a part of the unlawful combination, as shown by the bill of exceptions now before this court is as follows:

Dynamite as an explosive began to be exploited during the early '70s, Mr. P. S. Du Pont himself testified that it was a field "quite separate from black powder" (Trans., p. 84, folio 252). In 1880, the Du Pont interests and the Laflin & Rand interests took it up and carried it on on the Atlantic Coast through the instrumentality of the Repauno Chemical Company and the Hercules Powder Company. By 1895 it had become an important factor in the explosives trade and the Eastern Dynamite Company was formed for the purpose of *consolidating* these interests. (Ibid, pp. 99-100; 673-674.) It at once acquired the Repauno and Hercules Companies (P. S. Du Pont, Trans., p. 85, folio 253).

The officers and directors of the Eastern Dynamite Company were identical with the former Hercules and Repauno Companies. Mr. Haskell became its president and active manager, and has so remained. (Haskell, p. 1646.) Just previous to the organization of the Eastern Dynamite Com-

pany, the California dynamite interests entered the field occupied by the Repauno Chemical Company and the Hercules Powder Company in competition with them. After its organization the California interests retired entirely and had no representation of any kind upon the Board. (Haskell, Trans., p. 1612.)

The Eastern Dynamite Company was formed with a Capital stock of $2,000,000. Of this $1,400,000 was given to the former stockholders of the Repauno Chemical Company and the Hercules Powder Company and $600,000 to the Atlantic Dynamite Company of California in exchange for all of its assets, excepting $5,000 which was reserved for the purpose of winding up the California Company. (Ibid, pp. 1759, 1760.)

The Eastern Dynamite Company thereafter cooperated with the Gunpowder Trade Association to make it a success. For example, it became a party to the "European" or "Foreign Agreement," and bore a part of the expense of maintaining that agreement (see supra, p. 50), until it was finally absorbed by the defendant Du Pont Powder Company. (Haskell, Trans., pp. 1613-1614, 1756, 1758.)

From the foregoing it will appear that the organization of the Eastern Dynamite Company resulted in a combination between the dynamite interests of the entire United States, as represented by the dynamite companies on the Atlantic Coast and those on the Pacific coast. From that time on there has been no serious opposition to the monopoly thus established in the Eastern Dynamite Company. The exhibits and the testimony of the witnesses show that the dynamite business controlled by the defendants was as high as 80.77

per cent. of the entire dynamite business in the United States, in 1903, the lowest being 69.41 per cent. in 1908. (See Defendants' Exhibit A-518, Trans., p. 2957; see also plaintiff's Exhibit 1125, 1125-A, Trans., pp. 2700-2702.)

Co-operation between the black powder interests in the Association and the dynamite interests is well and conclusively shown by the letter of instructions written by Mr. Haskell to his agent, Mr. Miller, on August 26th, 1895, immediately after he brought the dynamite interests into the Association (See Ex. 26, Trans, pp. 2556-2558):

> "Regarding our relations with Du Pont & Company and other Powder Companies, would say that I can best give you our desires by quoting from Circular Letter issued some time ago, outlining the policy we thought best, as follows:
>
> "From time to time Trade Report Calls will be sent out and we would indicate policy to be pursued in certain cases as far as local conditions will permit.
>
> "While we are very anxious to enlarge our trade and agents will use their utmost endeavors to achieve that end, it is not worth while to divert trade from associate companies, such as Du Pont, Hazard, Oriental, Ohio, etc., by cutting prices, as such a course will probably result in their meeting the price or perhaps cutting it and regaining the trade, which merely hurts the former seller and does no one any good *excepting the buyer.*
>
> "As our interest in the Repauno Chemical Company and The Hercules Powder Company is very large, it is our desire that agents and salesmen assist them as much as possible in marketing their goods whenever it can be done without cutting the prices of or interfering with The Atlantic Dynamite Company. Aetna Powder Company or The Hecla Pow-

der Company, and in case a buyer visited uses or buys dynamite the amount used, kind, price and of whom purchased should be touched on in Remarks of Trade Reports."

That this policy was continued by the "new management" after it obtained control is shown in the following extract from a letter of instruction written December 22, 1902, by Mr. Moxham, Vice-President of the defendant Du Pont Company to one of its agents (see Plaintiff's Exhibit 1147, Trans., p. 2656):

> "We would state to you in confidence, and with a special request that the information be not in any way divulged, that arrangements have been perfected with the Laflin & Rand Powder Company by which the *co-operation will be so complete as to amount to practically consolidation.* We give you this information as it will doubtless govern you in your handling of our business. The Laflin & Rand Company will exist as a separate company under the same control as heretofore. As matters progress, if you find developments going on that appear to you as 'playing into their hands' it may become intelligible to you when you realize that *it will not be to our loss.* On the other hand, if points of interest may arise whereby their co-operation will be to our good we will be glad to have you confidentially call our attention to the same.
>
> "We ask that no inkling of this should be permitted to reach any of the Laflin & Rand employees and that you give no confirmation to such rumors as may creep through the trade bearing on the matter."

II. Expansion and suppression of competition by agreement with competitive dynamite interests.

After the formation of the Eastern Dynamite Company the dynamite monopoly was rapidly expanded in two ways:

1. By agreements with competitive interests.

2. By purchase of competitive interests.

A series of agreements with other dynamite interests which were not directly owned or controlled by the Eastern Dynamite Company, began to be made about this time and continued to be made down to 1904. These agreements were:

(a) The Haskell-Fay agreements of 1895 and 1897—for co-operation and division of trade between competitive dynamite interests.

(b) The King Powder Company agreements in 1897 and in 1901—for controlling the output of an active dynamite competitor.

(c) The "Mexican" agreement in 1898—for co-operation with Pacific Coast competitors in the control of the dynamite trade in Mexico.

(d) The Hancock Chemical Company agreements of 1898—for controlling the output of an active dynamite competitor.

(e) The Sullivan-Fay agreement of 1904—for the continuation of the co-operation and division between the Fay interests, and the defendant Du Pont Powder Co. and Sullivan as the representative of the successor of the Trade Association *after* the defendant Du Pont Company had *succeeded the Association.*

(A) THE HASKELL-FAY AGREEMENTS OF 1895 AND 1897—FOR CO-OPERATION AND DIVISION OF TRADE BETWEEN COMPETITIVE DYNAMITE INTERESTS.

In 1895, previous to the organization of the Eastern Dynamite Company, a corporation known as the Aetna Powder Company (which was then managed and controlled by Mr. A. O. Fay) had acquired a considerable amount of business in the middle states in the manufacture and sale of dyna-

mite, and about the same time that the California interests were acquired and the Eastern Dynamite Company was formed, an agreement was made between Mr. Haskell and Mr. Fay for the purpose of maintaining "the present relative relation as regard proportions of trade between the two parties to this understanding *for the interests they represent.*" (See Plaintiff's Exhibit 1328, p. 2787, fol. 8361.)

This agreement, and the "interests represented" by these two gentlemen are thus explained by Mr. Haskell, (Trans., p. 1638, fol. 4913) as follows:

> "Q. What was the purpose of the original agreement that you made with Mr. Fay? A. To establish proportions of trade between the interests he and I represented.
>
> "Q. What were the interests he represented? A. The Aetna Powder Company.
>
> "Q. And what were the interests you represented? A. The Eastern Dynamite Company."

And it must be remembered that these two companies at that time, controlled all the dynamite business of the Atlantic coast and of the middle west, except that which was carried on through members of the Gunpowder Trade Association. Furthermore, Mr. Haskell was president of the Laflin & Rand Powder Company, and Mr. Fay, was president of the Miami Powder Company and the American Powder Company, all of which Companies had been for years members of the Gunpowder Trade Association and important factors in the *black powder* trade.

By this agreement the dynamite interests were brought effectually into complete affiliation with the black powder interests of the Gunpowder Trade Association.

Even the very *terms* of the agreement were similar to and patterned after those which governed the Gunpowder Trade Association (Trans., pp. 2787-2795):

(a) The business was apportioned between them and sworn statements of the business done by each of the parties were to be submitted to an Adjuster, who was to ascertain from a careful computation of the total business done by the parties, whether either party had exceeded the quota or proportion of business which was assigned to him under the terms of the agreement, and settlement was to be made for oversales and undersales, at a stipulated rate.

(b) A standing committee of five persons was formed which was to be composed of four parties to be selected by Mr. Haskell and one party to be selected by Mr. Fay and this committee had power to *designate prices* at which sales should be made by the parties and to consider and determine complaints of violations of the agreement.

(c) A set of rules was agreed upon, which was in effect similar to the Compendium of Rules of the Gunpowder Trade Association.

(d) Provisions were also made in case either party should subsequently purchase or acquire any interests in other high explosives companies, for the relative proportion which should belong to either party as affected by such increased manufacturing capacity.

Subsequently a supplemental agreement was entered into by Mr. Haskell and Mr. Fay for the purpose of making the quotas of each more definite, in view of the fact that each had acquired several other companies since the making of the former agreement. (Trans., p. 2792.)

The object and purpose of the Haskell-Fay agreements was to apportion between the companies controlled by the Eastern Dynamite Company and the Aetna Powder Company the trade in dynamite, so that each party should thereafter be conversant with the affairs of the other, and to eliminate competition between them, and to prevent any possibility of a disturbance of the operations of the then existing Gunpowder Trade Association which might occur by reason of offering dynamite advantageously to take the place of black blasting powder.

(B) THE KING POWDER COMPANY AGREEMENTS IN 1897—FOR CONTROLLING THE OUTPUT OF AN ACTIVE DYNAMITE COMPETITOR.

As already pointed out (supra, pp. 52-53), the *black powder* interests of the King Company were taken over by the Du Pont Company, through the King Mercantile Company, and its entire output contracted for a period of twenty-five years.

The *dynamite* interests of the King Company were the subject of separate contracts made with the Eastern Dynamite Company, as follows:

On the 31st day of December, 1897, after the Eastern Dynamite Company had been organized and had acquired all the interests that Mr. Haskell represented (including the California interests) the dynamite business of the King Powder Company, of Ohio—another member of the Gunpowder Trade Association—was brought under the control of the combination, by means of an agreement made by Mr. Haskell for the Eastern Dynamite Company, to which the King Powder Company was made a party. (See Plaintiff's Exhibit 1329, Trans., pp. 2796-2799.) The King Powder Company undertook to sell the explosives of the

Eastern Dynamite and the Aetna Powder Companies *exclusively*, and these two companies agreed to furnish the King Company such quantities of high explosives as it should require for re-sale up to 3% of the number of pounds sold by them in the United States. The two companies were required to select some company or companies controlled by them with whom the King Company should be required to "transact its business, make its returns, and receive instructions as to prices, terms, etc., at which powder covered by this agreement is to be sold. Until further notice, however, the Aetna Powder Company shall be the concern to which this clause refers." (The "Aetna Powder Company" here referred to was the company of which Mr. Fay was president.)

Provision was also made for the manner of placing orders and making payments and rendering statements.

The King Company agreed to follow the rules and regulations of the Price Committee "exception being made when trade is threatened by *outside* competitors or large contracts where it is *deemed advisable for some one company* to make a lower price to a former or large customer." The agreement was to run for ten years.

This agreement was modified on the first of May, 1901, by the King Powder Company agreeing to retire from active sale of dynamite in consideration of receiving $2,400 from the Eastern Dynamite and Aetna Powder Companies. (See Plaintiff's Exhibit 1330, p. 2800.) And by another agreement between the same parties on September 7th, 1904, the King Powder Company sold to the Eastern Dynamite Company its trademark,

"Rex"—a well-known and reputable mark or brand for dynamite. (See Plaintiff's Exhibit 1331, Trans., p. 2801).

(c) THE "MEXICAN" AGREEMENT IN 1898—FOR CO-OPERATION WITH PACIFIC COAST COMPETITORS IN AND CONTROL OF THE DYNAMITE TRADE IN MEXICO.

On October 1st, 1898, an agreement was entered into between the California Powder Works, the Giant Powder Company, the Judson Dynamite Company, the Aetna Powder Company and the Eastern Dynamite Company, (all manufacturers of dynamite the first three being concerns located in California and operating on the Pacific Coast and in Mexico), the objects of which were to regulate the trade of these parties with consumers of explosives in the Republic of Mexico and to establish prices therefor. The agreement is specific in detail concerning the method by which the business was to be apportioned, and the rules for conducting their business within that country; and among others contains the following significant provision. (See Plaintiff's Exhibit 1334, pp. 2815-2816.)

> "In the event of attacks upon the trade of any party to this agreement by any other manufacturer not a party to this agreement, the party whose trade is attacked may, having first obtained permission from Mr. H. M. Barksdale, and Captain John Bermingham, have authority to defend that trade against such *outside* competition within such limitations as may at the time be fixed by Mr. Barksdale and Captain Bermingham.
>
> "In case the party whose trade is attacked should not desire to defend its trade as herein provided, then it shall be permissible for Mr. Barksdale and Captain Bermingham to

authorize the Standard Explosives Company to take such steps as they may designate to meet the threatened *outside* competition, in order that the common interests may be conserved, the *profits from said trade being credited to the parties to this agreement in their proper quota proportions.*"

(D) THE HANCOCK CHEMICAL COMPANY AGREEMENT OF 1898—FOR CONTROLLING THE OUTPUT OF AN ACTIVE DYNAMITE COMPETITOR.

On October 11th, 1898, an agreement was made with the Hancock Chemical Company, having a plant in Michigan for the manufacture of nitroglycerine—which is one of the principal ingredients of dynamite—wherein the Eastern Dynamite Company was appointed "Selling Agent" and bound itself to take the entire output of the Hancock Chemical Company plant except that which the latter was already selling to certain specified mines. It agreed to pay 15% above the actual cost of manufacture. The contract was to run for five years and after that to continue until terminated by three months' notice. (See Plaintiff's Exhibit 1301, Transcript, p. 2784.)

On October 31st, 1898, the Lake Superior Powder Company—having a plant in the Lake Superior region, and of which Mr. Haskell was Vice-president—and the Aetna Powder Company. (Mr. Fay's Company) entered into an agreement with the Hancock Chemical Company (See Plaintiff's Exhibit 1333, Trans., p. 2804), reciting that these two companies were interested in the selling agency of the Eastern Dynamite Company under the Hancock Chemical Company agreement of October 11th, 1898, and that they would guarantee the performance of the covenants assumed by the Eastern Dynamite Company thereunder.

On February 20th, 1898, another agreement was made between the Eastern Dynamite Company, the Lake Superior Powder Company and the Aetna Powder Company, reciting that the Hancock Chemical Company agreement of October 11th, 1898 was made for their joint benefit, and agreeing to share the expenses of carrying it out. (See Plaintiff's Exhibit 1332, Trans., p. 2803.)

(E) THE SULLIVAN-FAY AGREEMENT OF 1904—FOR THE CONTINUATION OF THE CO-OPERATION AND DIVISION BETWEEN THE FAY INTERESTS, AND THE DU PONT POWDER COMPANY, AS SUCCESSOR OF TRADE ASSOCIATION.

After the dissolution of the Gunpowder Trade Association in June, 1904—at which time the interests represented by Mr. Fay (namely, the Miami Powder Company, the American Powder Company and the Aetna Powder Company) were left outside of the properties acquired by the defendant Du Pont Powder Company—another agreement was made between one Sullivan, on behalf of the Du Pont Company, and Mr. Fay, on behalf of the Aetna, Miami and American Companies. By the terms of this agreement there was an allotment of trade between the parties, and an adjustment provided for by which certain percentages of dynamite and black powder might be sold by the respective interests; if the Du Pont Company exceeded its quota it was to pay a certain rate on account of over sales, if it fell below its quota it was to receive a certain rate on account of under sales. (Haskell Transcript, pp. 1635, 1636, 1677, 1679, 1799.)

This agreement lasted until March 31, 1905 (Ibid, p. 1636).

There was no provision in this agreement as to the *prices* which should be charged by either

party, the reason for this being stated by Mr. Haskell as follows:

> "It was deemed entirely *unnecessary* and perhaps *unwise* to have control exercised by either of the other's sales as *regards prices.*" (Ibid, p. 1677, fol. 5031.)

Undoubtedly this was an attempt to avoid the *appearance* of making an agreement contrary to the Anti-Trust Acts. But Mr. Haskell was right when he said that it was *unnecessary* to insert such a provision in the agreement, because by allotting and apportioning the trade between them and fixing penalties for oversales they had removed all temptation to compete.

III. Expansion and suppression of competition by purchase of competitive dynamite interests.

From the time when the Eastern Dynamite Company was organized in 1895 down to the time when the Du Pont Powder Company was organized in 1903 various companies which were engaged in the high explosives industry—either by way of manufacturing raw materials (such as glycerine and acids) or the finished product—many of which had hitherto been operating independently and, therefore, more or less in competition with it, were absorbed in whole or in part by the Eastern Dynamite Company and their properties finally taken over and acquired by the Du Pont Powder Company. These were as follows (see Plaintiff's Exhibit 1093, Trans., p. 2622; also Test. Haskell, Trans., pp. 1803-1804):

Acme Powder Company.

American Forcite Powder Manufacturing Company.

Blue Ridge Powder Company.

Clinton Dynamite Company.
Columbian Powder Company.
Dittmar Powder & Chemical Company.
Enterprise High Explosives Company.
Hecla Powder Company.
Hudson River Powder Company.
James Macbeth Company.
Mt. Wolf Dynamite Company.
Pennsylvania Torpedo Company.
Standard Explosives Company, Limited.
Sterling Dynamite Company.
United States Dynamite Company.
Atlantic Dynamite Company of New Jersey.
Atlantic Dynamite Company of New York.
Atlantic Manufacturing Company.
Electric Exploder Company.
Explosives Supplies Company.
Forcite Powder Company of New Jersey.
Forcite Powder Company of New York.
Hecla Dynamite Company.
Hercules Powder Company.
Hercules Powder Company, New York.
Hudson River Wood Pulp Manufacturing Company.
Joplin Powder Company.

The manner in which these various corporations were acquired, and the amounts paid therefor is fully set forth in Plaintiff's Exhibit 1169, Trans., pp. 2663-2664; and Exhibit 1175, Trans., p. 2668.

IV. Expansion by co-operation between dynamite and black powder interests in making sales to particular classes of consumers of explosives—The "Wilmington High-Explosives Companies".

Mr. Haskell testified (Trans., p. 1616, fol. 4847) that:

> "In the sale of high explosives it very frequently occurs, particularly on construction work, that it is *necessary to sell black blasting powder in connection with high explosives.*"

For example, a railroad contractor uses both grades of explosives—black powder for the softer formations and dynamite for the rock, etc.—His business could be much more surely controlled by *co-operation* between manufacturers of *both* articles; and that this very thing was done is shown by the evidence. Before the Eastern Dynamite Company was taken over by the defendant Du Pont Powder Company, the term "Wilmington High-Explosives Companies" was used by all those members of the Trade Association who manufactured dynamite, as a title or trade-name for the sale of dynamite. This term was used to designate the Repauno Chemical Company, Hercules Powder Company, the Atlantic Dynamite Company, the Forcite Dynamite Company, and the Eastern Dynamite Company as the holding company (Trans., pp. 748-749); and all sales of dynamite which were made to those customers who used both high explosives and black blasting powder were made under this name (R. S. Waddell, Trans., p. 750):

> "The Wilmington High Explosives Companies that I have named, were enormous manufacturers of dynamite; and in the sale of their dynamite they required some black powder for their customers, and they obtained that through the—from the black powder companies who were in the association, and they made application for special prices and for contracts to be used in connection with their dynamite contracts with railroad contractors and public contractors, and where

the quantity of black powder was very small as compared with the dynamite, the sales were made through the High Explosives Companies, whichever one happened to have the contract with the trade.

"Q. How did the 'High Explosives Companies' obtain the black blasting powder which they required? A. They received that from the members of the association who were authorized to sell or contract."

Mr. Waddell testified that he, as the Agent of the Hazard and Du Pont Companies at Cincinnati, also acted as agent of the Repauno Chemical Company and that he came in contact with the dynamite business in that way (Trans., p. 749); while he was acting for Mr. Du Pont on the Special Committee of the Gunpowder Trade Association the Special Committee awarded a number of contracts and made special prices to the trade through the "Wilmington High Explosives Companies" (Trans., p. 734).

This testimony is well supported by the minutes of the Gunpowder Trade Association which are in evidence

Attention is called to the numerous contracts authorized by the Gunpowder Trade Association to be made with the "Wilmington High Explosives Companies," as set forth on pages 1349, 2824, 2825, 2828, 2829, all of 2830, 2831, 2832, 2833, 2837, 2843, 2844, 2845, 2846, 2856, 2857, 2858, 2867, 2870, 2871, 2872, 2873, 2874, 2879, 2880, 2881, 2882, 2885, 2886 of the Transcript.

Further evidence of the co-operation between dynamite and black powder interests is shown by the fact that not until October, 1907, was any price list issued for dynamite. At this time, and *coincidently* with the issuance of the first price list

for *black powder*, the first price list for dynamite and high explosives was also issued. (See Plaintiff's Exhibit 1120, not printed in Transcript.) See discussion of price lists infra page 94.

But the evidence tended strongly to show that the defendant Du Pont Company actually made use of its monopoly of the dynamite business to directly influence plaintiff's customers to abandon it in cases where those customers used both dynamite and black powder. Plaintiff, not being a manufacturer of dynamite, could not, of course, supply the dynamite needs of its black powder customers. It was, naturally, an effective measure to use with such customers to say that they could have no dynamite unless they also used Du Pont black powder. That this was actually done is supported by the testimony of Robert C. Bruce. He was a member of the firm of Bruce & Burdick, who were engaged at Joliet, Illinois, during 1903, 1904, 1905, in the stone, coal and powder business. During such period this firm acted as sales agent as well as a purchaser of black powder *and dynamite*—the powder being purchased from the plaintiff, and the dynamite from the Du Pont Company. Some time during the year 1904 Mr. Elliot S. Rice, the Chicago agent of the Du Pont Company, told him that unless he stopped buying black powder of the plaintiff, his principals would cancel their agency with him for dynamite (Trans., p. 2407). Mr. Rice denied that he had any such conversation with Mr. Bruce (Trans., p. 1847).

The Trial Court submitted this testimony to the jury to determine "whether it is a part of a general plan and purpose to injure the plaintiff in its efforts to secure business, or whether it is

merely to protect the interests of the defendants" (see Trans., p. 2472, fol. 7414); but not with respect to the question of the actual participation of the Eastern Dynamite Company in an overt act. It had already directed them to return a verdict for that company.

Boycotting goods of a competitor is "undue" restraint of trade.

Loewe vs. Lawlor, 208 U. S., 274;
U. S. vs. Keystone Watch Co., 218 Fed., 502.

V. Black powder and dynamite interests controlled by the same men—"Interlocking Directorates".

One of the important acquisitions by the Gunpowder Trade Association at the time when the dynamite interests were brought in combination with that Association through the Haskell-Fay agreements were certain gentlemen who have since been connected with the Gunpowder interests of the Association and the Du Pont Company down to the present day.

Among those primarily was MR. JONATHAN HASKELL. He was one of the Vice-Presidents of the Du Pont Powder Company since its organization, was the President and the active Manager of the interests represented by the Repauno Chemical Company and the Hercules Powder Company, previous to the time when the Eastern Dynamite Company came into existence, and was largely instrumental in bringing about its organization (supra, pp. 64-66).

In 1895 Mr. Haskell became President of the Laflin & Rand Powder Company, which was his first connection with the black powder interests in

any way. The Laflin & Rand Company was at the time a member of the Gunpowder Trade Association, and Mr. Haskell became one of the most active members of that body and so remained to the end. He attended the general meetings of the Association, was made a member of the Advisory Committee and of the "Special Committee", and the minutes of the subsequent proceedings show that he was the most active of all the members of that body in carrying out its purposes. (Haskell, Trans., p. 1709, folio 5157.)

The evidence shows that previous to the entry of Mr. Haskell into the Gunpowder Trade Association, and during the period that the dynamite business was developing under his management, the business of black blasting powder was materially interfered with and the affairs of the Gunpowder Trade Association were lagging very considerably.

From that time on the affairs of the Association were revitalized and a few months later, through his active influence, the "Understanding" or "1896 Agreement" was formulated; and the Equitable, the Phoenix and the Chattanooga Powder Companies, which were exclusively engaged in manufacturing black blasting powder were then brought into the Association and from that time forth until its final dissolution in June, 1904, it was not only active but was powerful and dominant in the explosives business in the United States.

After the organization of the defendant E. I. Du Pont de Nemours Powder Company, and the absorption by that Company of the various interests already described, he became one of its Vice-Presidents, a Director and a member of the Executive Committee. Haskell, p. 1646; also p. 1932.)

Besides, he was President and a Director in 8 companies, Vice-President and a Director in 6 more and Director in still 6 others, and an unnamed officer in one other—making 22 companies altogether which were members of the combination or their subsidiaries, whose business and affairs he assisted in directing. (Ibid., pp. 1646-1648.)

Mr. C. L. PATTERSON, who was originally employed by the Repauno Chemical Company, also came into the E. I. Du Pont de Nemours Powder Company, and continued as the representative of the high-explosives department for some time as Mr. Haskell's assistant. (Patterson, Trans., pp. 146-147.)

Another was MR. H. M. BARKSDALE, who had been connected with the dynamite business since 1887. He represented originally the Repauno Chemical Company and afterwards the Eastern Dynamite Company, and subsequently became one of the Vice-Presidents of the E. I. Du Pont de Nemours Powder Company, and a member of the Executive Committee. (Barksdale, Trans., p. 1914) His influence is well shown by the part which he bore in the contest with the Indiana Powder Company, he being a member of a committee appointed by the Gunpowder Trade Association to represent the dynamite interests, together with two others who represented the black powder interests in carrying on that fight. This committee organized the Great Northern Manufacturing Supply Company as a "fighting company" whose only object or purpose was to conduct the fight against the Indiana Powder Company until it should be driven from business. (See testimony R. S. Waddell, Trans., pp. 731-732.) It established its office at Terre Haute, Ind., near the Indiana Powder Company's location, and retailed powder direct to the miners at lower prices than the miners

could purchase powder of the operators. (Ibid., pp. 727-729.) When that contest ended by the absorption of the Indiana Powder Company, the Great Northern Manufacturing & Supply Company discontinued business (Ibid., p. 739.)

MR. T. C. DU PONT was elected President to succeed Eugene Du Pont and was appointed a member of the Advisory Committee and Special Committee of the Association. (Trans., p. 1670.) He was elected Chairman for the "American Factories" under the "Foreign Agreement." (Trans., p. 214, fol. 641; Haskell, p. 1663.)

MR. P. S. DU PONT was an officer and Director in the various companies which were organized after the acquirement of the Du Pont interests and also Treasurer, member of the Board of Directors and of the Executive Committee of the defendant Du Pont Powder Company after its organization. (P. S. Du Pont, Trans., pp. 1951-1952.) He also attended the meetings of the Association, from March, 1902 (Trans., pp. 75-77), to as late as January 1, 1904. (Trans., p. 110.)

MR. A. J. MOXHAM, who came in with the "new management" was President of the Hazard Powder Company and one of the Vice-Presidents, member of the Board of Directors and of the Executive Committee of the defendant Du Pont Powder Company. (Moxham, Trans., p. 1944.) He was also a member of the Association (Trans., pp. 127-128, 132); he attended its meetings regularly, was a member of the Advisory Committee and was very active in its affairs (Haskell, Trans., p. 1671); at the meeting of December 19, 1902, he delivered an address (see Plff's Ex. 22, p. 2539) which marked an epoch in the affairs of the Association and was largely instrumental in bringing about the dissolution of the Association. (Trans., p. 133.)

Third. The smokeless powder industry. Its Development—The organization of the International Smokeless Powder Company, and the acquisition of the actual and legal control thereof by the Du Pont Powder Company.

Prior to the entry of the "new management" and the organization, and the taking over, of the Du Pont interests by the defendant Du Pont Powder Company, smokeless powder was manufactured by the following companies (P. S. Du Pont, pp. 84, 95, 96, 113-116):

1. E. I. Du Pont de Nemours & Co.
2. Laflin & Rand Powder Company.
3. The American E. C. Schultz Powder Company.
4. The California Powder Works.
5. The International Smokeless Powder & Chemical Co.
6. The Du Pont International Powder Company.
7. The King Powder Company.
8. The Robin Hood Powder Company.

By the time the Du Pont Powder Company was organized in 1903, all the interests of all these companies, except the last two, had been brought under the ownership and control of the "new management," and after its organization the ownership and control of all these interests was transferred to it, as already detailed with regard to the acquisition of the black powder and dynamite interests; and this ownership and control was maintained during the entire existence of the plaintiff (Ibid, p. 96).

While the "new management" did not acquire actual legal *ownership* of the King Powder Company, they did in fact have effective *control*, by

reason of the agreement by which all *its output* was sold by the King Mercantile Company, which contract was acquired by the defendant, and which continued in existence until the Spring of 1906. (See supra, pp. 52-53.)

The Robin Hood Company never came under the control of the defendant (P. S. Du Pont, Trans., p. 95, fol. 285).

The International Smokeless Powder and Chemical Company was organized by the "new management." Subsequently the Du Pont International Powder Company was organized to take over and acquire the capital stock of the International Smokeless Powder and Chemical Company (Ibid).

The stock of this latter company was acquired by the defendant Du Pont Powder Company and it has ever since remained in exclusive control of all the smokeless powder manufacturing business in the United States, with the exception of that which was controlled by the Robin Hood. (Ibid; also Moxham, Trans., p. 139; also Haskell, Trans., p. 1649.)

That all commercial smokeless powder was handled by the Du Pont Powder Company is fully established by the testimony of its own employees. Wm. Coyne, its general sales agent, testified that it had always been exclusively handled through the Sales Department of that company. The government or ordnance smokeless powder was sold under special arrangement with the government. (Trans., pp. 382-383, fols. 1146-1147.)

All of the commercial smokeless powder which was sold was obtained from the smokeless powder plants at Carney's Point, Haskell, Oakland and

Parlin, all in New Jersey, and all owned by the Eastern Dynamite Company. There were no other plants manufacturing smokeless powder in the United States during the period from 1903 to 1908 with the exception of that of the American Powder mills near Boston. The plants controlled by the Du Pont Powder Company sold and controlled between 65 and 75% of all grades and kinds of *commercial* smokeless powder, the balance being controlled by the American Powder Mills (Ibid, p. 383).

Fourth. Particular methods and unfair practices used by the members of the Gunpowder Trade Association in the suppression of competition, during its existence, which were adopted and continued after its absorption by the defendant Du Pont Powder Company, and applied effectively to drive plaintiff out of business.

(a) The "Sales Board" as the successor of the "Advisory Committee"—The "Trade Report System".

A Sales Board was established by the Powder Company, which consisted of a Director of Sales, and Assistant Directors of Sales from each district, and a sales auditor. It was under the immediate charge of Mr. Haskell as Vice-President, (Haskell, Trans., pp. 1672-1673; also Patterson, Trans., p. 150). Its duties were to pass upon all matters relating to prices, (Coyne, Trans., p. 385) and the delivery of powder (Ibid.).

It performed the function formerly performed by the "Advisory Committee" of the Gunpowder Trade Association.

Judge Lanning, in the "Government Case" (at 188 Fed., 145), says:

"After the incorporation of the du Pont Company of 1903, *a sales board* was created. This Board, composed of a director of sales and assistant directors, *coexisted* with the advisory and special committees until June 30, 1904, when the committees *were superseded by the sales board*, which thereafter exercised the power of fixing prices and policies for the corporations that had, by the methods already outlined, been brought together *under one corporate management*. In July, 1904, there was no further need of advisory or special committees, or of the trade association formed under the agreement of July 1, 1896."

In 1892, while Mr. Haskell was connected with the dynamite branch of the explosive business, he originated a system of "Trade Reports", which was afterwards carried by him into the gunpowder industry when he became President of the Laflin & Rand Powder Company in 1895. Later on, when this Company was acquired by the defendant Du Pont Powder Company Mr. Haskell made the system applicable to the entire *consolidated* explosives business of the country. (Haskell, Trans., p. 1723). A "Trade Record Division" was established for their filing and orderly reference, and kept in charge of a manager. (Geo. H. Kerr, Trans., p. 328).

These "Trade Reports" were reports made by salesmen upon the trade of specific customers, giving the details of such information as they were able to obtain concerning his explosives requirements, etc. (Ibid).

A "Competitive Division" was also established by Mr. Haskell for the purpose of carrying on with the branch offices correspondence pertaining to sales matters where the trade had passed from

the Powder Company to a competitor. (Haskell, Trans., p. 1724).

Over 600 of these Reports were filed as Plaintiff's Exhibits in this case, none of which were printed, except those which are found in a Printed Volume of the record in the Government case. (See also Exhibits 74 to 666). They show upon their face various marks and signs which indicate whether the trade is "Competitive" or "partly competitive" or "active" or "inactive." These marks are in various colors, red, blue, etc.

Agents were directed to forward everything of interest that might be *picked up* bearing upon the general situation, even *including gossip and rumor,* and concerning business held by competitors even though they might not have any direct interest in it (See Plaintiff's Exhibit 1146, Trans., p. 2655).

This information was collected at Wilmington and disseminated to the branch offices or to their salesmen. (Waddell, Trans., pp. 804-805; also 945-950).

(b) Fixing lower prices in specific cases—fixing lower prices in competitive localities than in non-competitive.

During the existence of the Gunpowder Trade Association, lower prices were made in competitive districts than in non-competitive districts. This policy was adopted by the defendant Du Pont Powder Company and applied effectively in the territory tributary to the plaintiff's mills.

The prices shown on Plaintiff's Exhibit 1219 (See Trans., p. 2721) are conclusive upon this point. This exhibit was produced by Mr. Coyne, the Director of Sales of the Du Pont Powder

Company and sets forth the yearly average delivered price of explosives in the various districts from the years 1903 to 1908, inclusive. (See Trans., p. 379.)

Before passing to the examination of this exhibit it should be borne in mind that the territory naturally supplied from plaintiff's plant was embraced in the Pittsburg, Cincinnati, St. Louis and Chicago districts described thereon. It should also be borne in mind that "B. Blasting" indicates black blasting powder—the article manufactured by plaintiff.

It will be observed that in those districts where competition did not prevail—such as Marquette, Boston, New York, San Francisco, Nashville, Birmingham, Denver, Duluth—the prices obtained by the Du Pont company, were much above those obtained at the same time and under the same general conditions in the districts reached from plaintiff's plant.

In Philadelphia, Hazelton, Huntington, and Scranton Districts, there was, during this same period, competition with other companies—particularly the Rockdale Powder Company, with its plant located in Maryland, and engaged in the manufacture of powder *and dynamite*—which accounts for the lower prices which prevailed there.

This contest was similar in many respects to that used to drive the plaintiff out of business. Mr. Haskell, at a meeting between the representatives of the Rockdale Company and the officers of the Du Pont Company, openly stated to Mr. Koller, Manager of the Rockdale Company, that it was a case of the "survival of the fittest," and that the fight would be carried to a finish (see Trans., pp. 286-287).

Aside from this table the evidence was beyond dispute, that in May, 1905, the Du Pont Company made a general cut in the price of "B. Blasting" in plaintiff's territory, to 95 cents per keg, and that this price was maintained by that company until the fall of 1907—by which time plaintiff had lost nearly all of its customers and had practically ceased to do any business. (Haskell, Trans., p. 1717, fol. 5151; Patterson, Trans., p. 165, folio 493; Brewster, 2389-2390.)

Two other exhibits in the record show how and why this 95-cent price was made and maintained. One of these is the "Brewster Report" (Exhibit 1437, Trans., pp. 2940-2949); and the other is the "95-cent Price List" (Exhibit 1348, Trans., pp. 2734-2744.).

(A) The Brewster Report.

The "Brewster Report" was very conclusive on the point.

Mr. David S. Brewster testified that he was employed by the Du Pont Company in the "competitive division" of the Sales Department, in 1904-1905. That in the Spring of 1905, in obedience to orders given to him by Mr. Haskell, he made a report from the records of his office as to the prices that were being obtained by competitors of the Du Pont Company, in black blasting powder and dynamite, in the Central District of the United States; that this report was made for the purpose of submitting it to the Executive Board; that he completed it in the forepart of May, 1905, and turned it over to Mr. Bumstead, the head of his division (see Trans., pp. 2377-2379); that shortly afterwards a telegram was sent out from the Wilmington office to the general agent at Chicago authorizing a general 95-cent price (see Trans., p. 2381): that Mr. Bumstead told him that *this price*

was low enough to get the business (Ibid. p. 2402 fol. 7206); that the data which he examined in his possession at that time, concerning the prices the plaintiff was making, showed that "the prices that the Buckeye Powder Company were getting at that time, according to the report based on the information furnished by the salesmen, indicated that the Buckeye Powder Company were *getting a bigger price than the Du Pont people"*; the prices being, as he remembered, $1.15 and $1.20 per keg. (Ibid, p. 2383, fol. 7148.)

A document was subsequently produced from the files of the Du Pont Company, upon demand of plaintiff, which was said to be the report referred to by Mr. Brewster and it shows that the prices obtained by the Buckeye Powder Company at that time were as follows: In Kentucky, $1.25 to $1.50 per keg; in St. Louis district, $1.10 to $1.25 except one customer at 95 cents; in Wyoming, $1.65; in Iowa, $1.10 to $1.25; in Ohio, $1.05 to $1.25; in Missouri, $1.25 to $1.60; in Illinois, $1.00 to $1.35. (See Plaintiff's Exhibit 1437, pp. 2940-2949.)

(B) The "95-Cent Price List."

The "95-cent price list," is a list of consumers of black blasting powder in the Cincinnati, Chicago and St. Louis districts, to whom a price of 95 cents per keg was made by the authority of the Sales Board of the Du Pont Powder Company. (See Plaintiff's Exhibit 1248, Trans., p. 2735.)

These authorizations covered the States of Ohio, Indiana, Illinois, Kentucky, Missouri and Kansas (Coyne, p. 1599.)

The first authorization was made on May 5, 1905—which supports Mr. Brewster's testimony

—and the last on October 8, 1907 just six days before the issuance of the first price list, advancing the price in the same districts ten cents per keg.

There were a total of 445 authorizations to sell at 95 cents. The Du Pont Company succeeded in selling as a result of 154 of the authorizations. (Coyne, Trans., p. 1602.)

The foregoing evidence enables one to understand what Judge Lanning meant when he stated in the opinion in the Government Case that (188 Fed., p. 145).

> "This policy of fixing prices in particular cases, affecting particular localities, was one which the independent manufacturers of explosives could not easily cope with."

(c) Advancing prices after each contest was ended.—The first regular price lists.

It was the uniform policy and practice of the Associate Companies during the life of the Association to immediately raise prices after each contest had ended by the absorption of the independent companies. In 1886, after the close of a contest with the King and Ohio Companies, when the first pool was formed, the price of rifle powder jumped from $2.25 per keg to $4.00; and the blasting from 80 cents to $1.50. In 1896, after the close of the contest with the Equitable, Phoenix and Chattanooga Companies, the price on rifle was advanced from $3.00 to $5.00, and on blasting from 90 cents to $1.25. (Trans., p. 742.) After the close of the contest with the Indiana Powder Company, price of blasting powder was advanced from 90 cents to $1.25, and in December, 1902, it was again advanced ten cents per keg in the territory occupied by the Indiana Powder Company. (Ibid, p. 740.)

This policy was applied to the plaintiff. By the Fall of 1907 the plaintiff had been practically driven out of business. Its trade had sunk so low as to be of no consequence. Mr. Haskell testified that the defendants had ceased to give any further attention to its quotations. (See Trans., p. 1938, folio 5812.)

The defendants proceeded to take the step which had uniformly been taken at the end of every contest, namely, it *raised* its prices.

No regular, open price list was ever issued by any one in the powder trade during its entire history until the Du Pont Powder Company issued the first one in the Fall of 1907. (Patterson, Trans., p. 152; also Coyne, Trans., p. 381.)

Price List No. 1 was issued October 14, 1907.

It increased the price of blasting powder ten cents per keg—from 95 cents to $1.05 in the Illinois district. (See Plaintiff's Exhibit 1119, not printed in record.)

At the same time the first price list for High Explosives (dynamite, etc.) was issued. (See Plaintiff's Exhibit 1120, not printed in record.)

Price List No. 2 was issued about two weeks later, on Dec. 1, 1907, increasing the price of blasting powder 5 cents per keg—from $1.05 to $1.10. (See Plaintiff's Exhibit 1118, not printed in record.)

Price List No. 3 was issued about seven months later, on July 10, 1908, increasing the price of blasting powder another 5 cents per keg—from $1.10 to $1.15. (See Plaintiff's Exhibit 1117, not printed in record.) This price list obtained until 1912 when No. 4 was issued.

(d) Tying-up the trade by a system of contracts.

Black blasting powder has always been mainly used in coal mining operations. The custom is for the owner or operator of the mine to buy the powder in large quantities, and resell it to the miner, a keg at a time as he may need it. The miner is therefore the real consumer. The owner buys from the manufacturer as cheaply as he can and the miner pays him a substantial profit. In Illinois, for example, by agreement between the mine owners and the miner's association, the miners paid $1.75 per keg for powder which the evidence shows, cost the owner 90 cents to $1.25 per keg. The owner is merely a jobber—buying and selling at a profit. The powder company is the wholesaler and the mine owner is the retailer. His situation, under the law, is not different from a jobber in cameras or in shoes.

On June 10th, 1917, the Gunpowder Trade Association began the development of a system of tying up the trade in explosives by inducing each mine owner to enter into a contract with the respective member of the association to whom his trade had been alloted or apportioned, for the purchase of all the requirements of his mine, for a period of from two to five years, in consideration of a rebate of from five to fifteen cents per keg, which was calculated on a sliding scale according to the number of kegs annually consumed at his mines.

These contracts could be made only upon the authority of the governing body of the Association, and were confidential.

> "The terms and conditions as well as the existence of this contract to be confidential." (See Trans., p. 542, folio 1626; p. 544, folio 1631.)

Rebates on outstanding contracts were often *increased* in those cases where there was competition or danger of competition from sources outside of the association, or where for any reason it became necessary to make a reduction in price to the mine owner.

Many instances of increase of rebates are recorded in the minutes of the association (see for example, Trans., 2824-2825).

The purpose and policy of the Contract System was to tie up the trade so that competition would at least be discouraged and rendered difficult if not impossible.

Mr. Moxham in his Speech before the Gunpowder Trade Association in 1902 makes this clear when he says:

> "It has been the general policy to cover the *future demand* by contracting for as lengthy a period as possible." (See Plaintiff's Exhibit 22, p. 2539, fol. 7616.)

As soon as the Association authorized the making of contracts the agents of the various members were instructed to encourage their customers to enter into contracts. The system was followed with such success that in 1902 about one-fourth of the *entire trade* in the United States was under contract. (See Trans., p. 1235, fol. 3705.)

The contracts were distributed among the members of the Association on December 19, 1902, (See Plaintiff's Exhibit 22, Trans., p. 2549.):

	No. kegs under Contract
Du Pont Co.	985,864
Hazard Company	237,013
Laflin & Rand	241,960
Equitable Co.	86,399

Oriental Co.	33,105
Ohio Company	2,775
Miami Company	121,615
King Company	104,040
American Company	2,575
Chattanooga Co.	143,262
Austin Company	42,287
Phoenix Company	40,081
Sycamore Company	19,550
Indiana Company	358,414
Northwestern Co.	23,040
Total	2,441,970

ADOPTION OF THE SYSTEM BY THE DEFENDANT DU PONT POWDER COMPANY AFTER ITS ACQUIRED LEGAL OWNERSHIP AND CONTROL OF THE ASSOCIATION MEMBERS.

The defendant acquired all the contracts that were in existence at the time that it acquired, took over and absorbed the following members of the Association: E. I. Du Pont de Nemours & Company, Sycamore Powder Mills, Hazard Powder Company, Laflin & Rand Powder Company, Schaghticoke Powder Company, Oriental Powder Company, Ohio Powder Company, Marcellus Powder Company, Lake Superior Powder Company, Chattanooga Powder Company, Southern Powder Company, Phoenix Powder Company. (See Haskell, p. 1695, fol. 5085.)

Mr. T. C. Du Pont, President, testified that when he came into the powder business in 1902 he found that it was a custom to have contracts for powder, and he "adopted" it (Trans., p. 1909, fol. 5725):

"The contract system was there when I got in the powder business.

"Q. And you followed the system which

was in existence at that time? A. Yes, sir. So far as I know there was no change made in it."

Mr. Barksdale, Vice-President, testified as follows (Trans., p. 1915, fol. 5743):

"Q. The same method of contracting for explosives, either *dynamite* or blasting powder, that prevailed prior to the time when you became associated with the Powder Company has continued since? A. Yes, sir.

"Q. The same thing? A. Yes, sir."

Mr. Moxham, Vice-President, testified to the same effect. (See Trans., p. 1951, fol. 5852.)

The co-operative policies of the members of the Association were continued long after it was formally dissolved or abandoned in June, 1904, through this System of Contracts and rebates. These contracts were continuous, running on for a term of years, without interference; and the Miami, the Equitable, the Austin, and the others that were not absorbed by the Du Pont Company, *retained the contracts* which had been awarded to them as a part of the system while members of the Association, and these contracts and the rights acquired by these companies in them continued to be respected long after the Association had ceased. So that while the meetings of the Association may have been discontinued, when they were no longer necessary, the co-operation under the Contract System continued on. (See Trans., pp. 1208-1209.)

In the contests which prevailed from time to time, the business of the customer was first obtained by cutting prices to a point so low that powder could not be made and sold at a profit. The competitor then retired from the contest. Thereupon, to make sure of its advantage, it proceeded to *tie up* the customer by inducing him to enter into a contract, for a period sufficiently

long to discourage the competitor from again seeking his trade.

Plaintiff's Exhibit 1248 (Trans., p. 2735) known as the "95-cent Price List" (just discussed at pp. 92-93, supra) furnishes good evidence of this practice.

The list itself shows that 86 contracts were made by the Du Pont Company at 95 cents, so that that company secured the business of those particular consumers for several years as a result of the price. The evidence shows that the powder could not be made and sold at a profit at 95 cents. This evidence is fully discussed below under Point VIII. (See Infra p. 181.)

CONTRACT SYSTEM EMPLOYED TO TIE UP THE TRADE IN THE DISTRICT REACHED BY PLAINTIFF.

The Contract System was first applied effectively to drive a competitor out of business in the case of the Indiana Powder Company during the contest which was carried on between that company and the Association from 1897 to 1901. The testimony shows that the trade in the district where the Indiana Powder Company operated was induced to enter into contracts wherever it was possible. (See Testimony R. S. Waddell, pp. 732-733.)

In the case of the Indiana Powder Company it did not *begin* contracting the trade, until after that company had already become powerful by having itself made contracts with the important trade in its district. But in the case of the plaintiff, the Association began contracting the trade in the territory tributary to plaintiff's plant, just as soon as it became known that this competitor was to enter the field.

The plaintiff was incorporated on the 28th day of January, 1903. Its plant was under construc-

tion in May, 1903. It began business in September, 1903.

At the meeting of the Advisory Committee of the Gunpowder Trade Association held on the 27th day of May, 1903, the associate companies were authorized to make a large number of contracts in the district reached from plaintiff's plant, and the E. I. du Pont de Nemours & Co. (the 1902 Du Pont Corporation organized by the "new management") was authorized to make or renew contracts, and to increase rebates and make special prices to a large list of consumers of black blasting powder in the *immediate vicinity* of plaintiff's mills (see Ex. 1348, pp. 2822-2826).

At the meetings of the Special Committee of the Association held in June and July, 1903, further contracts were authorized to be made in the same district (see Ex. 1349, Trans., p. 2837).

That this authorization was carried into effect is shown by Plaintiff's Exhibit 1143 (Trans., p. 2708), known as the "Rice List," which contains a list of 97 customers in the *immediate vicinity* of plaintiff's mills, with whom contracts were made by *the Du Pont Company alone* in 1903 and 1904 —to say nothing of those which were made by the Hazard, the Laflin & Rand, the Oriental, and the various other companies which were members of the Association, though the legal control over them had been at the time actually acquired by the defendants.

Mr. Rice, himself, who was the agent for the Du Pont Company in the Chicago district during this period, testified that **every coal operator in the State of Illinois who consumed 1,200 kegs or more was under contract** (See Trans., p. 1850, fol.

5550), and that the larger part of the trade in black blasting powder in that district was covered by contracts. (See Trans., p. 1857, fols. 5570-5571.)

Mr. Waddell testified that that trade was no more accessible to the plaintiff than if its plant were located in Europe. (Trans., p. 1208, fol. 3623.)

J. G. Miller, who sold the product of the mills of plaintiff on a net price basis, from 1904 until it went out of business in September, 1908, testified that he travelled through Illinois, Iowa, Minnesota, Kansas and Missouri and solicited business the same as when he was in the employ of the Laflin & Rand Company; that he called on customer after customer and was informed that he could do no business with him because he was under contract (Trans., pp. 305-306). He gives the names of a large number of other concerns, of whom he obtained their trade for the plaintiff, and whose trade he afterwards lost (see Trans., p. 315), but he was not permitted to state the reasons given by these customers for not continuing to do business with him, which forms the subject of an Assignment of Error No. 17 and fully discussed under Point XI (infra, p. 249).

The effect of the Contract System upon the business of the plaintiff is also shown by the large number of depositions taken by the defendants. These depositions were taken as the result of the Answer to the demand for a Bill of Particulars, wherein plaintiff furnished a list of the names and addresses of a large number of its customers who were induced by the various unlawful acts of the defendants to abandon it. In order to disprove this claim the defendants took

the depositions of about 100 of these persons. Many of them were of small producers whose output was less than 1,200 kegs per year, and who were therefore not in the class whose trade was subject to contract. Of those who were in the class entitled to contract, almost every one of them was under contract during nearly all of the period plaintiff was in business. It is true that these witnesses did not always give the existence of these contracts as their reason for not doing business with plaintiff, but the fact remains that they were under contract and that they felt bound thereby legally and morally and by self-interest.

As an aid to the Contract System—or rather to supplement it and as an aid in tieing up the trade—was another system known as the "Special Price System."

Where a consumer could not be induced to enter into a contract, application would be made to the Association for permission to make him a special price of 5, 10, 15 or 20 cents less than schedule price (Waddell, Trans., p. 733, fol. 2199). This right was given to some particular member of the Association, as for example, to the Hazard Powder Company, and no other powder company was permitted to enter into competition for such trade. (See R. S. Waddell, Trans., p. 1238, fol. 3714.)

The minutes of the Association in evidence show many instances in which special prices were authorized. (See, for example, Plaintiff's Exhibits 1348, 1349, printed at Trans., pp. 2821 to 2889.)

The practice was also followed by the Du Pont Powder Company after it succeeded the Association. See the "Rice List" furnished by its Chicago

agent. (Plaintiff's Exhibit 1143, Trans., p. 2708, fols. 8123, 8129, 8133, 8150.)

It is also shown by the fact that of the 445 specific authorizations of a 95-cent price which was made by the Sales Board of the Du Pont Company, as shown by the "95-cent Price List," none of these included customers who were already *under contract*. By the *terms* of many of these contracts, such customers were guaranteed the benefit of any *less* price which might be made during the life of the contract. These reductions to existing customers were not required to be specially authorized by the Sales Board.

The minutes of the Gunpowder Trade Association of June 10, 1897, which was the date of the beginning of the Contract System, recite that, "Any principal may guarantee contract customers against decline in prices" (see Trans., p. 1686, fol. 5056). See also as an example of a contract containing such guaranty, and as evidence that this practice was adopted by the Du Pont Powder Company, the contract printed in the Transcript on page 2619, as Plaintiff's Exhibit 1027. This contract was made between the Explosives Supplies Company (one of the subsidiaries of the Du Pont Company) and the Western Coal & Mining Company. Subdivision (h) at folio 7863 contains the following:

> "In case parties of the first part reduce their price to any company, corporation or individual in the State of Missouri (except to points on west bank of the Mississippi River, which take Illinois price), Arkansas, Kansas or Indian Territory, below the price named herein for each of these states, parties of the first part guarantee to parties of the second part a like reduction in price for

similar deliveries so long as they make such reduced prices and in such quantities."

(e) Trading and exchanging contract customers—the rule of "equities."

The policy was followed of recognizing the existing trade of each member, and it was divided up for the future upon a so-called "equitable" basis so as to avoid the possibility of conflicting interests, and thereby weaken the influence and endanger the stability of the Association. This practice became very general and the interests so set off and treated were described as "equities."

Mr. Haskell best describes the practice as follows (see Trans., pp. 1735, 1736):

> "It was generally not possible that more than one concern could make a contract with a given individual buyer, and it was arranged that if a particular concern was permitted to make a contract, if another concern had sold that same buyer powder during the test period, that an effort should be made to get that buyer to use that amount which that other concern would be entitled to sell. Failing in that, equities were exchanged so a given concern might trade an equity in one trade for an equity in another trade and make a contract which would cover all the equities of the case."

The practical workings of the rule is thus described by Mr. Waddell (Trans., p. 719): The coal trade of the Pocohantas field at Bramwell, West Virginia, consisting of about forty coal companies, was divided between the King, Hazard, Du Pont and Laflin & Rand Company in the following manner:

> "The rule of the association fixed and determined what company should have the con-

tracts—any contract. We would apply to the powder company, the principal that we represented—with a statement of the number of kegs that we had supplied a given customer during the previous two years, with the price that we had charged for it and made application for permission to contract with that customer. I applied at Cincinnati while agent there for the Hazard and Du Pont Company for permission to contract with all of those companies in that list. The King Company did the same, and we conflicted. Under the rule, the King Company having secured part of the Hazard customers and a part of the Du Pont customers would be entitled to an equity in their trade, so that we were mixed up with equities when we came to make the first contract, and by agreement between the Hazard—between myself representing the Hazard and Du Pont Company, and Mr. O. E. Peters representing the King Company, we offset our equities in the trade of these coal companies. That is, I would trade my equities in one of his customers with him for his equity in the trade of the others, so that we separated the trade and made certain customers Du Pont contracts and certain other Hazard contracts, and the others were King. And in the district we found one Laflin & Rand customer and they took over that contract."

(f) "Respecting" the contract trade.

The trade of the members of the Association was "respected" by all other members. In other words, an *appearance* of competition was kept up between them; and this practice was continued by the Du Pont Company after it acquired the physical properties of the various members and after the "dissolution."

When a contract was once made with a customer by one of the members of the Association,

that contract was respected permanently after that period and that particular associate was permitted to make renewals of that particular contract from time to time; and was authorized to make whatever prices were necessary to continue to hold that trade (Haskell, Trans., p. 1734, fol. 5202; also p. 1736, fol. 5207).

Instances of how this policy was made effective in particular cases appear in the minutes of the Association. (See Trans., pp. 1011, 1012; also pp. 1740-1743; also pp. 1747-1748.)

Mr. Waddell testified that he came in contact with it frequently. He said he never had but one competitor for trade of a given customer and that competitor was the powder company to whom that customer's trade was *originally* assigned and contracted by the Powder Association. Once a Du Pont customer, always a Du Pont customer, and none of the associate companies ever afterward competed with that company for *that* trade (see Trans., pp. 813-815).

(g) The legal effect of the Contract System as employed by the Defendants was to prevent Competition and restrain Trade.

These contracts were numerous; they were identical or nearly identical in their terms; they embraced the greater part of the more important mine owners in the territory reached from plaintiff's plant; and while the mine owner did not agree in terms not to use or deal in the commodities of competitors, the rebates constituted sufficient inducement for the mine owner to give all his trade to the Du Pont Company. Both parties understood that they were intended to secure the exclusive trade, and each acted upon this understanding.

The testimony of many of the witnesses, showed that they regarded these contracts as lawful and binding, and imposing upon them the obligation to deal exclusively with the powder company.

Therefore, the case comes within the rule laid down by Judge Lurton in *John D. Park & Sons vs. Hartman,* 153 Fed., 24, 41, and approved and followed by this Court in *Miles vs. Park,* 220 U. S., 373. Judge Lurton said:

> "In the first place, we are to consider that we are not here dealing with a single contract. The complainant has made a multitude of them in identical terms, and the opposite parties comprehend, according to his bill, a large majority of the wholesale and retail druggists in the United States. *The reasons which might uphold covenants restricting the liberty of a single buyer might prove quite inadequate where there are a multitude of identical agreements.* The single covenant might in no way affect the public interest, when a large number might. So, also, the question as to whether the restraint was necessary to the retained business, and, therefore, ancillary to the principal purpose of the agreement, or whether the restraining covenants were not the principal rather than the ancillary matter, would largely depend upon the general sweep and result of a multiplication of identical contracts. The general purpose of each separate contract is the regulation of the prices and sales of the line of preparations made by complainant. *A common purpose unites each covenantee to every other and the 'system' is to be construed as 'one piece,' in which the complainant and every assenting dealer, whether wholesaler or retailer, is a party,* and the agreement of each such covenantee to sell only at the prices dictated by the manufac-

turer *constitutes one general scheme.* The question here is, therefore, one of a totally different character from that which would arise if the question was the more simple one presented by a breach by a single covenantee. In *Continental Wall Paper Co. v. Voight & Sons Co.* (C. C. A.), 148 Fed., 939, where was involved a combination in restraint of trade, and where each wholesaler and retailer in the business had executed separate, but identical contracts with the corporation representing the combined manufacturers, we held that each such separate covenantee was *a party to the general scheme for enhancing prices.* This was rested upon the holding that the several agreements constituted one whole. See, also observations of Judge Taft in *United States v. Addyston Pipe Co.*, 85 Fed., 275, and of Justice Peckham in *Montague v. Lowry,* 193 U. S., 38, 45, 46.

"A general system of contracts, such as that which the complainant seeks to enforce, and which the bill avers is a method generally adopted in his line of business, involves very different questions from those which arise when a single contract only is involved and when the action is between the contracting parties for a breach, as was the case in *Garst v. Harris,* 177 Mass., 72; 58 N. E., 174, and *Elliman v. Carrington,* L. R. 1901, 2 Ch. Div., 275."

In *U. S. Telephone Company vs. Central Union Telephone Company,* 202 Fed., 66, 71.

"A *general system* of contracts may be obnoxious to an anti-trust law, though the individual contract would not be."

Contracts which provide for the giving of rebates when the object in so doing is to secure the exclusive trade of another have been held invalid in *Dennehy vs. McNulty,* 86 Fed., 825. A con-

tract in the form of a rebate certificate which was a promise on the part of a distilling company to refund at the end of six months, a certain sum per gallon on all purchases made during that period, was held to be in violation of law and unenforceable because tending to create a monopoly.

The common law rule relative to rebating was enacted into statute by Congress in the Clayton law. It was provided, by Section 3, that it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods or fix a price charged therefor, through discount from, or rebate upon, such price, on the condition, agreemnt or understanding that the lessee or purchaser thereof shall not use or deal in the goods of a competitor, where the effect is to substantially lessen competition or tend to create a monopoly.

POINT II.

It was error for the Trial Court to instruct the jury that there was no evidence to the effect that the defendants exercised any influence over the affairs of the Equitable and Austin Powder Companies, or to the effect that they knew anything about, or had anything to do with the purchase of plaintiff's plant by Mr. Olin and Mr. Lent.

Akin to the subject just discussed, in so far as it relates to the affiliation and co-operation between *nominally* separate interests, but which were in reality acting *in combination* to control the explosives trade, are the questions, involved in Assignments 10 and 11 as follows:

ASSIGNMENT No. 10: The Court instructed the jury as follows (see Trans., p. 3203, fol. 9609):

> "There is *no* evidence to the effect that the defendants or any of them exercised *any control at any time* over the affairs of the Equitable Powder Company or the Austin Powder Company by virtue of any stock that they have held in those corporations, and therefore you must not consider any claim to the effect that they had exercised such control."

ASSIGNMENT No. 11: The Court also instructed the jury as follows (Trans. p. 3204, fol. 9610):

> "There is *no* evidence showing that any of the defendants knew or had anything whatever to do with the purchase of the Buckeye Powder plant and property by Mr. Olin and his associates, and therefore you must not consider the fact of such purchase as tending to establish any combination or conspiracy or other conduct prohibited by the Sherman Act."

While these two assignments will be argued together, the first is more far-reaching than the second, in that it includes the second, and also raises the question whether the Equitable Powder Company and the Austin Powder Company continued to act *in combination* as co-conspirators with the defendant Du Pont Powder Company, after it had absorbed and succeeded the Gunpowder Trade Association.

Allegations of the Declaration.

Briefly stated the plaintiff alleged in the declaration that, being unable to withstand the great and continuing losses forced upon it by reason of the unlawful acts of the Defendants, it was finally compelled to offer its mills, plant and business for sale; that the methods employed by the Defendants and their co-con-

spirators against the Plaintiff had become generally known as the methods that had long been similarly employed against other manufacturers and vendors of powder who had attempted to operate independently of the defendants, and who had been unable to survive the combined assaults of the defendants and their co-conspirators, and for this reason there was no general market for such property except among the defendants and their co-conspirators, and among investors who had been accustomed to invest only in such properties as were operated or controlled by them; that plaintiff, not being able to find a purchaser, finally solicited the defendants and some of their co-conspirators to purchase its mills and plant at its fair and reasonable value, and in order to avoid a total and irretrievable loss of the entire value of said properties, was forced to accept any offer that it might be able to obtain therefor without regard to its true and fair value; that on or about the 19th day of September, 1908, plaintiff sold its entire plant, mills, business and good will for the sum of $70,000 to one Franklin W. Olin; that Mr. Olin purchased it *at the instance* of the defendant the Du Pont Powder Company, by reason of a contract which he made with the said defendant whereby it agreed to purchase 95 per cent. of the *future output* of said mills and plant for a long period of time; that immediately after Mr. Olin purchased said properties, he organized a corporation known as the Western Powder Manufacturing Company and thereupon transferred these properties to it, and that the output of these mills was allotted to the defendant Du Pont Company and its associates; that at the time of the purchase, Mr. Olin was the President of the Equitable Powder Manufacturing

Company and that 49 per cent of the stock of said Company was then and is now held by the Du Pont Company; that immediately after said purchase and transfer, the said mills and plant began operating to their full capacity and have so continued to the present time, and that its business at once became very profitable, and that the entire output has ever since been disposed of at its fair value.

Plaintiff alleged that the true value of the plant, mills, business and good will was the sum of $500,000 and claims damages for the difference between said value and the price at which it was compelled to sell the same.

The Contention of the Parties and the Evidence in Support of Plaintiff's Allegations.

The harmful effect of the two instructions now under consideration was far-reaching among other issues of the case, because—

(a) They negatived plaintiff's contention that these two companies *continued to act in combination with and as the co-conspirators* of the Du Pont Powder Company to control the trade in explosives, after the absorption of the Gunpowder Trade Association by that Company; and

(b) They also negatived plaintiff's contention that after its business had been destroyed by this combination and conspiracy, Mr. Olin and Mr. Lent purchased its plant as a part of the plan to suppress competition; and

(c) They supported the contention of the defendants—and one which they vigorously pressed throughout the trial—that they themselves were in *active competition with these two companies* and that whatever they did in a competitive way —such as making prices, etc.—was intended to be

directed against these two defendants as well as its other "competitors," and was, therefore, only incidental in its effect on the plaintiff.

This latter contention not only impressed itself upon the Trial Court but on the Court of Appeals (Trans. p. 3185, folio 9555). It says:

> "To refute the charge that the defendants had oppressively and illegally lowered prices, *evidence was offered* that during the period in question there was much *independent competition,* led by the plaintiff itself, and that this competition was the prevailing, if not the sole, factor in lowering prices. There *was also evidence* that the Du Pont Company's hold on the trade continually diminished during the whole period of the suit."

But the evidence upon which the Court below bases the above conclusions was in dispute and was the very evidence that the Trial Court took away from the jury so far as the Equitable and the Austin Powder Companies were concerned.

The respective contentions of the parties centered about Exhibits 1126 and 1127 (Trans. pp. 2704-2707) which was prepared by Du Pont Company officials and vouched for by Mr. Coyne, its general sales agent. They purported to show what the capacity and output was of the Du Pont *owned* plants, in contrast with that of *all other plants,* which were denominated as "competitors." According to this theory the Du Pont plants had a total capacity for the year 1904, of 8,250,000 kegs; and that of the so-called "competitors" for the same year was 4,005,000 kegs.

Included among the "competitors" were the following companies—all of whom were members of the "Gunpowder Trade Association." The first one was Mr. Lent's Company—in which the

Du Pont Company owned 33% of its stock; the second and third were Mr. Olin's Companies—in which the Du Pont Company owned 49% of the stock; the entire output of the fourth was controlled by the Du Pont Company as its selling agent under a 25-year contract (Supra pp. 52-53), **and the fifth and sixth, were the "Fay Companies" which were bound to the Du Pont interests by the "Haskell-Fay" Agreements** (Supra pp. 68-71):

1.	Austin Powder Company,	480,000 kegs.
2.	Equitable Powder Company,	300,000 kegs.
3.	Egyptian Powder Company,	247,000 kegs.
4.	King Powder Company,	420,000 kegs.
5.	American Powder Company,	90,000 kegs.
6.	Miami Powder Company,	480,000 kegs.
	Total,	2,017,000 kegs.

Adding this to the 8,250,000 kegs of the Du Pont owned plants, and we have a total of 10,267,000 kegs per annum controlled by the defendants and their *co-conspirators*.

Mr. Coyne exerted all his ingenuity as an astute witness to uphold the theory of the above Exhibits; but succeeded in making it more certain that there was no real competition from any of these companies. (Trans., pp. 412-424.)

At any rate all this evidence was disputed, and as such it should have gone to the jury; and neither the Trial Court nor the Court of Appeals had any right to determine the issue.

The evidence in the record in support of the foregoing allegations will be considered under three heads:

FIRST: What transpired in the Gunpowder Trade Association and after it was succeeded by

the defendant Du Pont Company up to the sale of plaintiff's plant as evidence of the control which the Du Pont Company exercised over the affairs of the Equitable and Austin Companies, and in combination with them; and

SECOND: What transpired *after* the sale of plaintiff's plant as evidence of the knowledge and interest which the Du Pont Company had in the purchase; and

THIRD: The only just and legal conclusion to be drawn from the evidence.

I. What transpired before the sale as evidence of knowledge and interest which the Du Pont Company had in the transaction.

(*a*) *Evidence of the continuation of the combination between these interests to control the explosives trade, after the dissolution of the Trade Association.*

It is *undisputed* that the Equitable Powder Company was organized in 1891 (Trans., p. 574, fol. 1720); that Mr. Olin was its founder and has always owned or controlled 51 per cent of its stock (Trans., p. 597); that it operated independently, or *outside* of the Gunpowder Trade Association until 1896, when it became a member of said Association (Trans., p. 574, fol. 1722); that at this same time, the Du Pont interests acquired 49 per cent. of its capital stock and have retained it ever since (Trans., pp. 589-590, fols. 1767-1768); that immediately afterwards (that is, "early in 1907,") the Equitable Powder Company acquired the stock of the Egyptian Powder Company (Trans., p. 595, fol. 1783); that in 1907, the Equitable Powder Company acquired 30 per cent. of the stock of the United States Powder Com-

pany (Trans., p. 595). All the foregoing is shown by the testimony of Mr. Olin himself. He adds, however, that he conducted all the negotiations himself and did not disclose his purpose to buy the Egyptian Company, or the United States Company to anyone connected with the Du Pont Company, but carried on the negotiations therefor in secret. The Du Pont Company, through its ownership of the 49 per cent. of the stock of the Equitable Company, nevertheless participated in the purchase and received the direct benefits thereof, as stockholders, and the indirect benefit by the removal of these competing companies from the competitive field; and there is no intimation that it ever opposed these purchases. On the other hand he testifies that they have sometimes sent him a proxy to vote their stock, and that while there had sometimes been a diversity of opinion between them, he could not recall a single instance in which there had been such a diversity as to cause them to vote one way and he another (Trans., pp. 604-605).

While Mr. Haskell agrees with Mr. Olin to the extent that the Du Pont Company has not exercised any influence or control over the *managerial* policy of the Equitable—that is its selling policy—he makes it clear that he has not been a mere dummy director, and very significantly contradicts Mr. Olin when he says (see Trans., p. 1933):

> "I as a member of the Board of Directors of the Equitable Company, have attended the meetings, discussed questions of *acquisition of property*, and the other *physical* matters pertaining to the operation of the plant."

Mr. Haskell also said that, as a member of the

Board of Directors of the Equitable, he was conversant with what Mr. Olin was doing concerning the purchase of the Egyptian Company and the United States Powder Company, at the time he did it (Trans., p. 1798, fol. 5394).

It is *undisputed* that the next step taken by Mr. Olin in the acquisition of competing interests was the purchase of plaintiff's plant in 1908. In this step he was joined by Mr. Lent and thereby the Austin Powder Company was brought into closer affiliation with the Olin interests. They organized the Western Powder Company as an operating company; but the ownership of the plant soon passed to Mr. Olin's other company, the Egyptian Powder Company (Trans., p. 586, fol. 1758). The acquisition of these various companies placed Mr. Olin (with his 51 per cent. in the Equitable Company), and Mr. Lent (with his 67 per cent. in the Austin Company), and the Du Pont Company (with its 49 per cent. in the Equitable and 33 per cent. in the Austin) in possession of six separate explosives plants located in Illinois, Arkansas, Indiana and Ohio, viz. (pp. 586-587):

The Equitable Powder Company, two.
The Egyptian Powder Company, one.
The United States Powder Company, one.
The Western Powder Company, one.
The Austin Powder Company, one.

And in addition to these is the Western *Cartridge* Company controlled by Mr. Olin, but in which the Du Pont Company holds preferred stock (Trans., p. 587, fol. 1789).

It is *undisputed* that Mr. Waddell began in the Fall of 1907 to make efforts to find a purchaser for his plant, and negotiated with various

persons and interests without success; and that in the Spring of 1908, in his search for a buyer he began negotiations with Mr. Olin for its purchase, and on September 19, 1908, these negotiations culminated in the sale and transfer of the plant to him. (Trans., p. 1982, folio 5946.)

It is *undisputed* that the interests represented by Mr. Olin and Mr. Lent were not only affiliated with the Du Pont Company at the time when the plant of the plaintiff was purchased by Mr. Olin, namely, September 18th, 1908, but they had been so affiliated from the time of the organization of the Gunpowder Trade Association down to the time when the Association was dissolved in June, 1904, and even as late as November 11, 1905, when the Equitable was remitting to the American Chairman on account of the European Agreement (See Trans., p. 578, folio 1732, also p. 582).

Mr. Olin and Mr. Lent as members of the Gunpowder Trade Association had been active in conducting its affairs and were well known to be loyal and earnest in support of the policies sought to be carried out for monopolizing the trade in explosives.

Mr. Lent was Secretary of the Association and Mr. Olin was a member of its Executive Committee, and of special committees; and the record shows that both these gentlemen were present at most of the meetings, and influential in participation in its affairs.

It is *undisputed* that the Equitable, the Egyptian, the United States, the Austin Powder Company, and all other alleged competitors of the Du Pont Company, after the issuance of the first price list, *advanced* their prices to the same rate, and only in exceptional cases have they since departed therefrom (Haskell, Trans., p. 1942, fol.

5826; Coyne, Trans., pp. 381-382), which was a very strong circumstance justifying the jury in drawing the inference that there was a combination between these interests to monopolize the explosives trade.

Mr. Olin is an inventor or designer and manufacturer of powder-making machinery and the Du Pont Company has always been a large user of his machinery in its various mills. (Olin, p. 2011, fol. 6032.) It is in evidence that as a part of its policy to control the explosive trade, it has entered into contracts with various manufacturers of powder-making machinery for the exclusive use of their machinery. (See Test. of Jacob Schoemehl, Trans., pp. 777-787; R. S. Waddell, pp. 766-768, 788.) See contract with Indiana Powder Company owned by the Du Pont Company (Trans., pp. 779-781.)

(*b*) *The agreement to take a large part of the output as an inducing motive for Olin and Lent to purchase plaintiff's plant.*

It is also *undisputed* that the following correspondence passed between the Du Pont Powder Company by Mr. Patterson its Vice-President, and Mr. Olin. (See Plffs. Exhibits 1240, 1241, Trans., pp. 591, 594.)

"E. I. Du Pont de Nemours Powder Company
"Wilmington, Delaware.
"Vice-President's office.
"November 18th, 1908.

"Personal
"Mr. F. W. Olin, President,
"Equitable Powder Mfg. Co.,
"East Alton, Illinois.

"Dear Sir:

"In confirmation of our interview in New York, I understand that the arrangement agreed upon is that we are to purchase at

least 75,000 kegs of blasting powder a year from the Peoria Mill, and have the privilege of taking 100,000 kegs if we want them, and the price to be paid for this powder is to be 95c. a keg for 1-4 of our purchases and 97½c. a keg for the balance, both prices being f.o.b. mill.

"The arrangement to continue in effect for one year and thereafter indefinitely, subject to a reasonable notice from either side of a desire to cancel it.

"Will you kindly advise me if the foregoing is in accord with your understanding? If so, will you please suggest what notice you think would be reasonable to be given by either side in the event of wishing to terminate the arrangement? Will you also advise the date upon which you would like the arrangement to begin? I would add that it is my understanding that we will not be expected to take the uniform amount each month, but that the amount ordered per month may be varied to suit the requirements of our business, so long as our total orders for the year do not fall below 75,000 kegs, or over 100,000 kegs.

"Yours very truly,

"CHARLES L. PATTERSON,

"Vice-President."

"Peoria, Ill., November 21st, 1908.

"Chas. L. Patterson, V. P.,

"Wilmington, Dela.

"Dear Sir:

"Replying to your letter of November 18th, file S D—8993, I think the same fully covers our understanding and agreement as formulated in New York.

"I should say that three months' notice might be considered as a reasonable time for either party to adjust themselves to new conditions—if the contract was to be terminated. We will be in position to supply you with powder in the near future as, assuming that this matter is now closed, I have

ordered a car of Du Pont kegs, the same as we formerly manufactured for you and shipped to your Belleville Mill, for powder to be manufactured and shipped to Peoria. If this is not satisfactory, please advise.

"Yours truly,
"WESTERN POWDER MFG. CO.,
"(Signed) F. W. Olin,
"President."

It is true that Mr. Olin tries to avoid the effect of the letter of November 18th as evidence of a previous understanding between himself and the Du Pont Company concerning the purchase of the Buckeye plant, and particularly the words, "in confirmation of our interview in New York," by saying, on cross-examination, that the letter was received by him "*probably* three or four days after our conference in New York." (See p. 600.)

The effect of this statement if accepted by the jury to be true, if the question had been submitted to them, would have been to negative the inference that the interview which called forth the letter was held *prior* to the purchase of the Buckeye plant—the letter being dated November 18, 1908, and the sale of the plant having been completed on September 19th, 1908. His statement regarding the *particular* interview might be true (which we do not for a moment concede), and yet it would not justify the trial court in withdrawing from the jury the right to determine for themselves whether it was true, in view of all the surrounding circumstances. There are many facts in the record which go to show that the interview referred to in the letter from Mr. Patterson was the *culmination* of the negotiations rather than their beginning.

FIRST: In the first place it must be noted that

Mr. Olin refused to put himself on record *positively* in regard to that particular interview.

On his cross-examination the following occurred (Trans., p. 600):

> "Q. Now, Mr. Olin, when that arrangement was made, as shown by these letters that passed between you and Mr. Patterson, had there been previous negotiations in reference to the matter? A. I *think* not.
>
> "Q. Had there been negotiations about the purchase of the powder, previous to those letters? I ask the question, because one of the letters refers to the fact that you met Mr. Patterson in New York? A. That was the first conference, I *think* on the subject."

Mr. Olin's statement was, however, not conclusive by any means, and the jury should have been permitted to consider his testimony together with the other evidence in the record. There is much evidence in the record which controverts Mr. Olin's recollection of the matter, some of which is as follows:

SECOND: The evidence shows that Mr. Coyne, as Director of Sales of the Du Pont Company at the time when this purchase was made, had "practically entire charge of the marketing of all the products of the Du Pont Powder Company, with the exception of Government powder." (Trans., p. 370, fol. 1110.)

Furthermore, it was Mr. Coyne who did have charge of the purchases which were subsequently made from the Western Powder plant. (Trans., pp. 377, 378.)

Mr. Patterson could not therefore have agreed to purchase from 75,000 to 100,000 kegs per year without some previous conference with the proper

officers of his own company, and without having obtained previous authority.

THIRD: In view of the long and bitter feeling and the competitive contest which had been maintained between the Du Pont and the Buckeye Powder companies it is not at all likely, even if Mr. Patterson *possessed* the authority to act independently and agree to purchase at least 75,000 kegs per year, that he would have exercised such authority without consultation with the officers of the Du Pont Company.

FOURTH: It was about the time of the purchase of this plant by Mr. Olin (see Trans., p. 590, fol. 1770), that this same Mr. Patterson *went on the Board of Directors* of Mr. Olin's principal company, the Equitable Powder Company. Mr. Haskell, another Vice-President, who had been on the Board for the previous five or six years, still remained. What was the reason for adding Mr. Patterson to the Board at this particular time, if it was not to look after the increasing interests of the Du Pont Company, caused by the acquisition of the plaintiffs mills? Mr. Patterson was added for *some reason*. It was proper for the jury to draw its own inferences from the surrounding circumstances what that reason was, and to infer that it was because the Buckeye plant was to be added to the *holdings of the Equitable Company* in which the Du Pont Company was then, and for twelve years had been, the owner of forty-nine per cent. (49%) of its stock.

FIFTH: It appears from a letter written by Mr. T. C. Du Pont in December, 1906, that the officials of the Du Pont Company were fully conversant with Mr. Waddell's efforts to dispose of his plant to the Coal Operators. Is it possible that the Du

Pont Company would be better advised concerning the sale of plaintiff's plant, to *entirely outside* interests, and not know anything about the negotiations which had been carried on for nearly a year with their own associate, and which finally culminated in the property being taken over by a corporation in which they were directly interested as large minority stockholders? Furthermore, this letter clearly suggests *a policy,* with reference to the purchase of the plant and business of the Buckeye Powder Company, which applies to the situation very forcibly (Trans., p. 622):

> "We have understood for some time that Mr. Waddell has been trying to dispose of his powder plant to operators. Our experience in *other directions* has taught us *that we can usually make much better terms* for the purchase of such a plant after the operators have tried the experiment of making their own powder rather than before, and if, therefore, we were to seriously consider the purchase of this plant *we would prefer making the effort after the operators had gathered the experience that is probably before them.*"

The "experience" referred to by Mr. Du Pont where the operators had tried the experiment of making their own powder was undoubtedly the case of the Indiana Powder Company. (See Supra p. 83.)

(c) *The policy of the defendants with respect to purchase of the output of competitors, rather than the plants themselves.*

The evidence also shows that after the 1902 Du Pont Corporation came into existence, the policy was announced by the leading officials of the company that from that time forth no further purchases of competing plants would be made. (See Trans., p. 1556.) But it is also in evidence that a

better way had been discovered to carry on an effective combination without running so much danger of coming into conflict with the law. This way found expression in the contract which was made between the Du Pont Company and the King Mercantile Company, to *purchase its output* (see supra, pp. 52-53).

The change of policy concerning the purchase of plants was *in name only*. Instead of buying up competing plants by taking them over *in their own name* they made the interests of the competing company identical with their own by contracting to take its entire output.

The contract with Mr. Olin to purchase the output of this plant was but the continuation of this policy.

II. What transpired after the sale to Olin as evidence of the knowledge and interest which the Du Pont Company had in the transaction.

Further evidence that the Du Pont Company had knowledge of and something to do with the purchase of the plant by Mr. Olin is found in the fact that after the plant had been purchased by Mr. Olin the sale of its product was permitted to be made to *Du Pont customers without opposition* from the Du Pont Company. Elsewhere, (see infra, pp. 190, 203, 207, 209) it is shown that while the plant was being operated by the plaintiff there was constant opposition on the part of the miners and others against the use of Buckeye powder at certain mines. As soon as the title to the property passed into the hands of Mr. Olin we find that this opposition ceased instantly and that such mines as those of Applegate & Lewis and others, where the opposition had been most bitter, were per-

mitted to make use of the powder manufactured at this plant immediately, without any opposition whatever.

Furthermore, the Du Pont Company allowed Mr. Olin to sell powder from this plant to the customers of the Du Pont Powder Company, who were *under contract* with the Du Pont Company. In other words, the Du Pont Company immediately *shared its business* with Mr. Olin and surrendered its contract right, without protest. Some of these operators were as follows: A. Reents & Bros., Spoon River Coal Company, Winters Coal Company, Big Creek Coal Company, Clark Coal & Coke Company (Olin, Trans., p. 589).

In others words, as soon as the plaintiff ceased business, the contention over the powder produced at the same plant immediately ceased. There were no further "tests" or strikes, or contests of any kind concerning the substitution of some powder other than Du Pont.

Mr. William J. Thrush who was employed by the Du Pont Company to lead the opposition to plaintiff's powder at the Applegate & Lewis mine (sometimes called the "Hanna City" mines), testified as follows (Trans., pp. 687-688):

> "Q. What powder is being used at the Hanna City mines at the present time? A. Western powder.
>
> "Q. Western powder—where is that manufactured? A. It is manufactured over at Edwards Station, Illinois.
>
> "Q. The powder plant known as the Western Powder Manufacturing Company's plant? A. Yes, sir.
>
> "Q. When did they begin using Western powder at the Hanna City Mines? A. *They were using just as quick as Mr. Waddell, I believe, went out of business.*

"Q. Was there any complaint made at any time after you began using Western powder, *by the miners,* on account of Western powder? A. *None whatever.*

"Q. Were you familiar with the kind of powder used in the mines at the time Mr. Waddell sold his property you speak of? A. Yes, sir.

"Q. What powder was being used just before he sold out? A. Du Pont powder.

"Q. And what powder was used shortly after he sold out? A. *Just as quick as we got rid of the Du Pont powder, they used Western.*

"Q. And have they used Du Pont powder since that? A. Not to my knowledge.

"Q. And have you been working in the mines continuously since that time? A. That is right.

"Q. Did you ever hear any more complaints regarding the quality of the Western powder after Mr. Waddell disposed of his property? A. No, sir.

"Q. Have you ever heard any complaints regarding the quality of that powder from that time down to the present day? A. No, sir."

III. The only just and legal conclusion to be drawn from the undisputed evidence negatives the Court's instruction.

The conclusion from the foregoing undisputed evidence is irresistible that the defendants knew all about the situation of the Buckeye Powder Company,—that its plant was being offered for sale, that it had been offered by Mr. Waddell to the coal operators and others, and that the contract which they made with Mr. Olin to purchase the output after he should acquire it was the *principal inducing motive* for him to buy it.

Taking these facts into consideration, together with the fact that the defendants actually participated in the benefits accruing from the sale of the plant, shared its customers, and thereafter cooperated with Mr. Olin and Mr. Lent in maintaining the prices, how is it possible to say that there is *no evidence* of a combination between these interests to control the explosives trade, or of the charge that the defendants knew of, and had something to do with, the purchase of this plant.

It is stretching human credulity to the limit to ask one to believe that the managers of the Du Pont interests were kept in ignorance of all these transactions.

The law implies knowledge on the part of the Du Pont Company from its situation as a stockholder. "Control" of a corporation by its stockholders is a question of fact as well as law.

The evidence, above summarized, should all have gone to the jury for the exercise of their own judgment both as to the facts and the inferences to be drawn therefrom.

In law, the Du Pont Company was *presumed* to know that the negotiations were pending and that the purchase had been authorized and would be made, not only by virtue of the ownership of forty-nine per cent. of the stock of the Equitable Company, but also because of the fact that it was directly interested in the ownership of the plant purchased from the plaintiff, for the reason that the Equitable Powder Company was the owner of the Egyptian Powder Company, and the Egyptian Powder Company was the owner of the Western Powder Company. (See Trans., page 586, folio 1758.)

In the case of *United States vs. Union Pacific Railroad*, 226 U. S., 61, the question of how far a minority stockholder could be said to exercise control was considered and a rule announced. It was asserted that because the Union Pacific Railroad did not acquire a majority of the stock of the Southern Pacific it did not in fact exercise any control over the acts of that company in suppressing competition. The amount which it finally held as a minority stockholder was forty-six per cent. The Court held that "a compact united ownership of forty-six per cent. is ample to control the operations of the corporation."

It has been stated by publicists that it is not necessary to own anything like a majority of the stock of a corporation in order to have "actual and complete control" of its affairs; that in fact ten per cent or even five per cent of the capital stock will sometimes give actual control as effectively as if the possessor had it all. This is due to what has been termed "stockholder inertia"; or the disposition of the investor to trust the management of the corporation's business to the board of directors or to those who are in influential positions with respect to its affairs—financial or otherwise.

Singularly enough the very evidence given by the chief officers of the Du Pont Company, conclusively establishes that this is not a mere theory.

The testimony of T. C. Du Pont, the president of the Du Pont Powder Company, concerning the influence of that company as the holder of *minority* interests in affiliated corporations, is very much in point here. Previous to the organization of the defendant Du Pont Powder Company

in 1903 the Du Pont interests had held a minority interest of 42 per cent., in the California Powder Works (Trans., p. 275, folio 823). In explaining the relations of the Du Pont Company as a minority stockholder under such circumstances Mr. Du Pont said (Trans., p. 211, folio 633):

> "The California Powder Works, which was not absolutely controlled by the Du Ponts in stock ownership, but which was *practically* controlled by them, because the other stockholders were in no case, or in very few cases, much interested in the powder business and they always went more or less by what the Du Ponts wanted done; so that they really controlled that as much as if they really had owned it."

Mr. P. S. Du Pont, Treasurer of the Du Pont Powder Company, testified that in most of the many corporations which the "new management" acquired, the 1902 Du Pont corporation found itself the largest single stockholder, but still a minority stockholder; therefore he determined to purchase further stock, if possible, in these various corporations, "or to make a plan by which the minority stockholders should have *common interests* in the whole concern," and very significantly concluded as follows (see Transcript, pp. 105, 106):

> "The Du Pont Company was largely interested in all the corporations—in fact, was the *controlling* factor from the virtue of the fact that they were the largest stockholders and were best versed in the line of business in which the companies were engaged. Many of the minority stockholders were not practical men or had nothing to do whatever with the business."

POINT III.

The order of the Trial Court requiring Plaintiff to make an election between Sections One and Two of the "Sherman Act" upon the theory that the things declared to be unlawful by each Section forms a separate cause of action, was erroneous.

Upon motion of the Defendants at the close of the entire case and just previous to the time when the arguments were to be presented to the jury, the Court required Plaintiff to make an election whether under the Declaration it would rely upon the first or the second section of the Sherman Act in seeking a recovery. (See Trans., p. 2433.)

In obedience to the order of the Court, preserving an exception thereto, Plaintiff elected to rely upon Section 2 of said act. (Ibid.)

This action of the Trial Court is covered by Assignment of Error No. 4, as follows, (see Transcript, page 3199). The Court erred—

> "In refusing to correct the error of the District Court in making an order requiring the plaintiff in error to make an election whether under its declaration it would rely upon the first or second sections of the Act of Congress of July 2, 1890, commonly known as the Sherman Act."

The order was based upon the ground that the acts declared unlawful by the first section of the Sherman Act constitute one cause of action, and that those declared unlawful under the second section of the Act constitute another cause of action; and that in the Declaration they were pleaded as one cause of action.

The Court below in arriving at the conclusion that the Trial Court was right in this ruling, bases its views on what it erroneously supposes to have been the action of Judge Rellstab in the early stages of this suit. We quote from the opinion as follows:

> "Moreover, we may take note of the fact that this subject had evidently been a source of contention from the beginning of the suit, as will appear from Judge Rellstab's opinion in 196 Fed., 514, where the original declaration is printed. The question of duplicity was thus raised at an early stage, and as a result of that decision an amended declaration was afterwards filed. But this also contained only one count, and, as Judge Lanning (sitting in the Circuit Court for the District of New Jersey) had already decided in *Rice v. Standard Oil Co.*, 134 Fed., 464, that a declaration in a similar suit under the same section was bad for duplicity because it combined two causes of action in one count, we think the trial Judge was sufficiently justified in requiring the plaintiff to elect."

The above conclusions are erroneous in the following particulars:

1. Judge Rellstab did not hold that the original Declaration was bad because it contained more than one count, but expressly held to the contrary. His own language, found at 196 Fed., 517, at the bottom of the page, sufficiently disposes of this contention, as follows:

> "As to the charge of duplicity. The defendants contend that the plaintiff has not only combined in one count all three causes for which actions are given by the Anti-Trust Act, but also alleged causes for which action are not given by such act. Paragraph

4 of such declaration is said to allege the causes of action founded on such act, and paragraphs 5, 14 and 17 the other causes of action. Paragraph 4 does charge the making of unlawful agreements, the entering into unlawful combinations and the maintenance of a practically complete monopoly. If in so doing, the pleader has combined two or more distinct causes of action, the pleading is bad for duplicity. *Rice v. Standard Oil Co.*, supra. But as a conspiracy may be accomplished by any number or variety of steps, some of which may be in the form of contracts, others as combinations, if the contracts and the combinations referred to in the declaration are but steps in such conspiracy, and such conspiracy has for its purpose the alleged monopoly, the *whole constitutes but one cause of action.* (*Connors vs. United States*, 158 U. S., 408; *United States vs. Swift*, 188 Fed., 92.)"

To make assurance doubly sure, Judge Rellstab proceeded to examine each paragraph of the Declaration above referred to, and thus concluded at the bottom of page 519:

> "The cause of action pleaded throughout the Declaration is *single*, and, therefore *not* bad for duplicity."

2. The amended Declaration was *not* filed because the first one was bad for duplicity, as the Court below states, but because—

(a) The Declaration was laid against twenty-eight persons called "defendants," only four of whom had been served and brought into court, and the Court ordered, "that the names of all the persons mentioned in such Declaration as defendants, except the four served, be struck out" (see 196 Fed., on page 520); and,

(b) That certain averments in paragraph 9 of the Declaration, were, (to again use the language

of the Court), "impertinent and irrelevant to any issue that can be raised in the cause, and should be stricken out." (See Ibid, on page 523.)

The amended Declaration when filed was almost identically the same as the original Declaration in form and contents, except in the two particulars above directed by the Court.

3. As to *Rice v. Standard Oil Company,* referred to above by the Court below, Judge Rellstab stated at pages 520-521:

> "Defendants rely almost entirely upon *Rice v. Standard Oil Company,* supra, as authority that in the particulars pointed out by them to be presently considered, the plaintiff's allegations are too vague and uncertain. In that case, the court applied strictly the well-established rules governing common law pleadings, making no distinction, apparently, between the common-law and statutory rights of action. In view however, of the decisions of the United States Supreme Court in which this subject-matter has been more recently considered, greater liberality than there permitted must be allowed the pleader who founds his cause of action upon the Anti-Trust Act, in the form of stating the several steps which, in his judgment, bring his cause of action with the purview of such Act."

The principal authority relied upon by Judge Rellstab in the above ruling was the case of *Swift v. United States,* 196 U. S., 375, in which Mr. Justice Holmes said that a new problem in pleading was presented by the Sherman law, but that that law had been upheld, and therefore, the courts were bound to enforce it notwithstanding difficulties; that it was "the scheme as a whole" which was within the reach of the law; and that the constituent elements "are bound together as

the parts of a single plan. The plan may make the parts unlawful." And again, that "the unity of the plan embraces all the parts." See lengthy quotation from this case in Judge Rellstab's opinion, 196 Fed., at page 521.

Section 7 of the Sherman Act prescribing a remedy for injuries suffered "by reason of anything forbidden or declared to be unlawful by this act," gives the plaintiff a single and indivisible right of action.

This section does not make any distinction between the things that are declared to be unlawful by Section 1 and those that are declared to be unlawful by Section 2.

The subject has received consideration in other jurisdictions, and the view contended for by plaintiff seems to be sustained by unanimous authority.

Mr. Justice Holmes said in *United States vs. Kissel,* 218 U. S., 601, 607:

> "When the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and shows such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies rather than to call it a single one."

The very question arose in *Cilley v. United Shoe Machinery Co.,* 202 Fed., 598; and *Strout v. Same,* 202 Fed., 602, which were actions under Section 7. Circuit Judge Colt held that a declaration, which was limited to a single count, was not bad for duplicity, for the reason that the thing forbidden by the statute may reside in the *scheme or combination considered as a whole,* fol-

lowing the authority of the *Swift* case, supra. Judge Colt's language (p. 601) is exceedingly pertinent to the issue here presented, as follows:

> "The defendant's theory of this case is that each one of the things forbidden by sections 1 and 2 are distinct offenses, and that in a civil action brought under section 7 the declaration should charge these separate offenses in separate counts. This theory does not accord with the view taken by the Supreme Court that the thing forbidden by the act may consist of 'the scheme as a whole' or 'the combination as a whole.' Under this construction of the statute it is plain that the separate elements considered by themselves may not be illegal, and yet that the scheme or combination as a whole may be."

In *Corey v. Independent Ice Company,* 207 Fed., 459, 463, Circuit Judge Dodge said that:

> "'Combination,' 'conspiracy,' and 'monopolizing or attempting to monopolize' need not necessarily be alleged separately and distinctly from each other but may be indiscriminately charged."

Monarch Tobacco Works v. American Tobacco Co., 165 Fed., 774, was an action to recover damages under Section 7 of the Sherman Act, upon the ground that—

> "The defendants combined and conspired with each other, and with various other persons unknown, in the form of trust or otherwise to *restrain* trade and commerce in tobacco among the several States; and, further, that the defendants combined and conspired to *monopolize,* and have *attempted* to monopolize, trade and commerce in tobacco among the several States. Such are the charges of the plaintiff against the defendant, and in general terms they come within the language of Sections 1 and 2 of the act."

All these allegations were set forth in one cause of action. It was held that the petitioner stated a good cause of action. Two of the defendants insisted that two separate causes of action not affecting all of the parties defendant were set up in the petition and moved to require the plaintiff to *elect* which to prosecute. The Court denied the motion for the reason, as it states:

> "We have no doubt that all the defendants are jointly charged with having entered into each of the alleged combinations and conspiracies complained of, and, while one is charged with doing one thereof, and one another, all of their acts, we think, are sufficiently alleged to have been done in *pursuance of a common design.*"

In *People's Tobacco Co. v. American Tobacco Co.*, 170 Fed., 396, the Circuit Court of Appeals for the Fifth Circuit had before it the identical question presented here. The action was to recover damages for injury to plaintiff's business by certain acts constituting not only a conspiracy to *restrain* interstate trade as prohibited by Section 1 of the Sherman Act, but also to an *attempt to monopolize* interstate trade as prohibited by Section 2. The petition set forth all these acts as one cause of action. The Court at page 407, says:

> "The first and second sections of the statute describe and condemn certain acts which restrain interstate or foreign commerce, and the seventh section provides that one who is injured in his business or property by another by reason of anything forbidden by the statute may sue for threefold damages. To repeat, the first and second sections condemn certain acts, and punish them as misdemeanors. The seventh section is to the effect that those who do the forbidden things, commit the mis-

demeanors, may be sued in a civil action for threefold damages by one who is injured in his business or property."

What is and is not a "cause of action" is well stated in *Occidental, &c., Co. v. Comstock Tunnel Co.*, 111 Fed., 135:

> "The principle I have thus deduced will serve as an unerring test in determining whether different causes of action have been joined in a pleading, or whether one alone has been stated. If the facts alleged show *one primary right* of the plaintiff, and *one wrong done* by the defendant which involves that right, the plaintiff has stated but a single cause of action, no matter how many forms and kinds of relief he may claim that he is entitled to, and may ask to recover. *The relief is no part of the* cause of action * * *. These suggestions are necessary to guard against a mistake of supposing that a distinct cause of action will arise from each special subordinate right included in the general primary right held by the plaintiff, or from each particular act or wrong which, in connection with others, may make up the composite but single delict complained of."

Furthermore, in practically all Equity cases brought by the Government under the Sherman Act, both sections 1 and 2 were involved, and the Government has never been compelled to elect under which section it would proceed. Under the Clayton Act, it is now provided that private persons may sue in Equity. See Act of Congress October 15, 1914 (38 Stats., 731, Section 16). If the ruling of the Trial Court is correct, the absurd situation will be presented that a private person will be required to elect in an action at law, but not in an Equity proceeding.

There does not seem to be any authority nor

any reason in principle, in support of the action of the Trial Court in requiring Plaintiff to elect.

Was the Error Harmless?

It was easy enough, and perhaps consistent, for the Court below, after having reached the erroneous conclusion that the Declaration had originally been held bad for duplicity, to reach the further erroneous conclusion that the ruling complained of was harmless, because "the easy remedy by amendment was at hand", and that plaintiff failed to take advantage of it.

We quote from the opinion (See Trans. p. 3187, fol. 9561):

> "But in any event we do not see how the ruling could have done harm; if the declaration did not support alternative charges, and if such charges were regarded as important to the case, the easy remedy by amendment was at hand. It is not surprising, however, that the plaintiff did not ask to amend; for we cannot conceive it possible that any one could doubt, at the end of this five months trial, that the plaintiff's case depended for success upon the truth of the charge (to which practically all the evidence was directed) that the defendants had unlawfully attempted to monopolize a large part of the trade in black powder. The case was certainly tried on the merits, and the ruling complained of was harmless, even if it were formally erroneous."

The statement that *"practically"* all of the evidence was so directed, is an admission that in the mind of the court there was *some* evidence in support of the "contract, combination in the form of trust or otherwise," which is declared to be unlawful by Section 1 of the Sherman Act. It is perhaps, however, a sufficient answer to this

contention to say that plaintiff was entitled to have the scheme or combination considered as a whole, by the jury, and not in part only.

The fact is that the motion and ruling requiring plaintiff to elect was made as the *final act*, after the case had been *argued to the jury*, and just before the charge of the Court. (See Trans., p. 2433.) Amendment at that stage of the case was entirely out of the question, as a matter of fact, even if not as a matter of law. Furthermore, it came as a complete surprise to the plaintiff as it was a reversal of the earlier position taken by the Court upon the motion to strike the Declaration. Plaintiff relied, and had a right to rely, upon the ruling made at this time, as being the law of the case.

The Trial Court did not let the matter rest with plaintiff's enforced election, but in its charge to the jury they were particularly enjoined to consider only the acts forbidden by Section 2, and the meaning and effect of that section was thus explained (see Trans., p. 2438, fol. 7313):

> "The plaintiff's grievance is, that the defendant has violated the second section of the Anti-Trust Act and which, as already noted, makes the monopolizing 'or attempt to monopolize' any part of the trade among the several States unlawful; and, that in consequence thereof it has been injured in both its business and its property. The suppression of competition is the dominant idea of the monopoly sought to be prevented by this act and where this condition results there is monopoly, no matter what steps were used to bring it about. Such unlawful monopoly, however, is not the only thing sought to be prevented by this section. To *attempt* to monopolize is also embraced in its legislative

purpose and an attempt to monopolize includes any means purposely adopted for and manifestly adapted to the accomplishment of such monopoly.

"As this second section, however, is but supplementary to the first section, and to make certain that the purpose of the first section be not evaded, but fully carried out, it follows that it is not every step which makes for monopoly that is within the prohibition of this section. It is only when the purpose of such step or its necessary effect is to stifle or to directly and substantially restrict competition that such step is an attempt to monopolize within such section."

By the ruling complained of, the jury was prevented from considering the *successful culmination of the attempt.* And, they might well argue, if the defendants did not succeed in the attempt how is it possible that the plaintiff was injured thereby. It must be apparent without argument that a mere attempt to monopolize, in itself could and ordinarily would be absolutely barren of *injurious* results. The jury might well have found, when explicitly limited to such injuries as might have resulted to plaintiff from the *attempt* only, that none such had been established.

The things "forbidden or declared to be unlawful" by Section 1 of the Sherman Act, which the ruling of the court prevented plaintiff from having the benefit of were:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations."

The following acts and facts, which are clearly established by the evidence, come within the definition of these prohibitions: The making of the "Fundamental Agreement" of 1889, and the "Gen-

eral Understanding" of 1896, and of the "Foreign Agreement" of 1897; the Haskell-Fay agreements and the other agreements by which the dynamite trade was monopolized and brought into combination with the black powder interests, and the various acts of these combined interests through the medium of the machinery provided by the Gunpowder Trade Association—such as apportioning trade, exchanging trade, fixing prices, imposing fines and penalties for disobedience of rules, the adoption of the system of tying up the trade by rebate contracts which began in 1896 and was continued on without abatement to the final overthrow of the plaintiff; the vicious price contests which gradually forced all competitors to join with them or retire from business. (See full discussion under Point I, supra, pp. 47-53.)

The acquisition by the defendant Du Pont Powder Company of the complete legal control of all the contracts, business and physical properties of various members of the Association and the retention by it of the fruits and benefits of the monopoly thus built up, the carrying on through the Sales Board of the same policies and practices of fixing lower prices in localities where competition prevailed than it fixed in those localities where competition did not prevail, the continuance of the policy of tying up the trade by the Contract System (pp. 87-106), the efforts to prevent Mr. Waddell from establishing an independent business in explosives (see Points V and VII), the blacklisting of employees who entered plaintiff's service (Trans. pp. 357-361), the fostering of opposition on the part of miners to the use of plaintiff's powder thereby forcing plaintiff's customers to abandon it and taking to itself the

benefits of the trade thus abandoned (see Point IX), the employment of railway agents to divulge information concerning shipments to plaintiff's customers (see Point X)—and the many other incidents and facts established by the evidence whereby plaintiff was finally compelled to cease business and dispose of its plant to the co-conspirators of the defendants. If these and other facts which the record discloses do not establish the successful accomplishment of the attempt to monopolize the trade in explosives, and the perpetuation of that monopoly by the defendants then it is hardly possible to conceive of a condition which would come within the provisions of Section 1 of the Sherman Act.

It is true that some of these acts and facts were submitted to the jury, but only for their consideration as evidence of an *attempt* to monopolize, and if the jury had gone beyond the consideration of the attempt and had entered the domain of the actual accomplishment of the result claimed by plaintiff, it would have been in disobedience of the Court's instructions.

POINT IV.

The Defendants did not acquire the right to perpetuate their monopoly by reason of long continued misconduct; and the fact that the Defendants were large and powerful as factors in the explosives trade and that Plaintiff's promoter had knowledge of this fact, and also had knowledge of their monopoly of the explosives trade and of their practices and policies in maintaining such monopoly, did not alter Plaintiff's right of action under Section 7 of the Sherman Act to recover for injuries suffered by reason of conduct forbidden by that act. Plaintiff was not bound under the Sherman Act to enter the business at its peril by reason of his knowledge of the unlawful practices of the defendants; nor did plaintiff occupy any different position as a competitor than it would have occupied if it had been in existence during the period that the Defendant's influence was being developed, and had suffered injuries at the hands of the Defendants during said period or afterwards.

The Court gave the following instruction, which is assigned as error No. 5. (See Trans. p. 3199.)

> "This suit is unique in many respects. The plaintiff, as a corporation and as a competitor in the powder business, is due to the efforts of R. S. Waddell, its chief witness in the suit. He organized it shortly after he separated himself from his employment with the defendant with which and its predecessors he

had been identified for about twenty years. His services, while in the employment of the Du Pont interests brought him in touch with their business policies and operations in the vending of powder. *He knew of the existence of the trade association and of such of the restraints and limitations put upon its members as related to the apportionment of the trade and the fixing of prices.* The comparative size of the defendant's capacity for output in relation to other powder manufacturers, and its influence as a factor in the trade generally, *were known to him when he severed his connection and when he conceived and began to carry out his purpose of entering into such powder field as a competitor.* **The plaintiff does not occupy the same position as a competitor in existence during the period that this influence was being developed and who may have been, during the course of such development, as well as after it had reached the height of its power, injured in its business or property by reason thereof, but is here as one entering the competitive field when such growth and influence have been established.** To it, this influence and power of the defendant, when it, the plaintiff was launched into the powder field, is not in itself actionable, even though that status is due in part to methods which are prohibited by the Anti-Trust Act, and before the plaintiff can recover it must establish that the defendant used its power in the trade oppressively, not necessarily against the plaintiff alone, but at least in the conduct of its business generally; that is, that it used such methods as, backed by its influential position, tended to the suppression of open competition and to obstruct the free flow of commerce—the trade conditions sought to be secured and protected by the prohibitions of the Anti-Trust Act, and that it, the plaintiff, was injured by reason thereof."

In our brief in the Court below, we summarized this instruction in language which still seems to us to properly interpret it and we cannot do better than to repeat it here as correctly analyzing its real meaning and effect, as follows:

> "It is tantamount to saying that monopoly needs but to obtain a foothold, and thereafter competitors must enter the field at their peril.
>
> "It was a virtual direction of a verdict for the Defendants, because it was equivalent to saying that long-continued violation of the law may ripen into *privilege,* and may become a *vested right.* It is a most dangerous doctrine that monopoly can gain the right to perpetuate itself *by prescription;* that one who may venture into the field occupied by it must do so at his peril, and if he does so with the knowledge of its existence, can claim no protection from its unlawful methods.
>
> "Certainly no surer way of perpetuating monopoly could be devised. No greater incentive to the creation of monopoly could be offered."

The Court below quotes this language in its opinion and adds (See Transcript, fol. 9567):

> "It is almost needless to say that the instructions of the learned judge carry no such meaning, and could have had no such effect."

It then proceeds to discuss the language of the Trial Court here excepted to in connection with the other parts of the charge to the jury and concludes as follows, (See fol. 9574):

> "We confess our inability to see anything objectionable in this language. It states nothing but *indisputable facts,* and does not take on a harmful character even when it is bracketed with the second passage complained of."

The "second passage" referred to is contained in Assignment No. 6, discussed Infra, page 157.

A careful reading of the opinion of the Court below in this respect, and an examination of the full charge to the jury (which was exceedingly lengthy) does not seem to disclose any necessary relation between the other parts of the charge quoted in the opinion, and the part above excepted to.

It appears to be a statement of a *general* rule which the Court intended that the jury should consider *generally* as applicable to the entire problem committed to them, for the purpose of making clear to their minds that *there was a distinction between the existing rights of the plaintiff, and what these rights would have been but for the knowledge and experience which Mr. Waddell had gained while in the service of the defendants.*

This interpretation of the meaning of this instruction is emphasized by the exception taken thereto for plaintiff in the presence of the jury, and the court's remarks made at the time (See Trans, p. 2518, fol. 7553):

> "MR. ABBOTT: We also desire to except to that portion of your Honor's charge to the effect that the plaintiff in this case does not occupy the same situation as one who had been in the field before the unlawful combination—
>
> "THE COURT: (Interrupting.) Whatever I said in regard to that."

It is in keeping with the views often expressed by the Court throughout its instructions in pursuance of its theory that the defendant possessed certain *primary* rights to the powder trade, and was entitled to maintain, at all hazards, the

monopoly therein which it had secured. If these rights did not become vested by prescription, they were at least "pioneer rights."

(a) Referring to the negotiations by Mr. Waddell with his employers preceding his leaving their employ to establish an independent business of his own, the Court said the question was whether the circumstances show a "purpose to prevent Mr. Waddell from entering into business as a competitor, or a desire on the part of the defendant to protect its *legitimate interests.*" (Trans., p. 2453, fol. 7358.) What these legitimate interests were the Court did not say, but what could they have been except to maintain the monopoly which it had already secured?

(b) Again, referring to the employment of Mr. Thrush, a miner, to exclude plaintiff's powder from the Applegate & Lewis mine at Hanna City, Illinois, the Court said the question here was whether the defendants were "prompted solely by the purpose of *protecting the trade* which the defendants *had had* with such mine *before* plaintiff succeeded in securing such trade", etc. (Trans., p. 2469, fol. 7406.)

(c) Referring to the threat made by Mr. Rice, the Chicago agent of the Du Pont Company, to Mr. Bruce, a customer of plaintiff (as testified to by Mr. Bruce) that unless he stopped buying plaintiff's powder the defendants would cancel his agency for their dynamite, the Court said the jury must consider whether this was done, *"merely to protect the interests* of the defendant," and that "the refusal of a manufacturer of several commodities to sell any of them to a customer unless he handled all, *is not in itself illegal*", etc. (Trans., p. 2472, fol. 7414.)

(d) And again in that portion of the charge which is discussed under Point X, the Court excuses or at least paliates, the acts of the defendants in their efforts to employ railway agents to divulge the names of plaintiff's customers and the destination of shipments from its plant, by saying that (see Trans., p. 2470, fol. 7410):

> "The plaintiff was a *newcomer* in a field *already occupied.* Except as to new business, it is inevitable that in order for the plaintiff to place its output it would draw some of the custom that theretofore had been flowing to the defendant or some other competitor."

And from these premises the Court proceeded to draw the conclusion that it was lawful to "keep tab" on the trade by maintaining "a surveillance over the conduct of such new competitor."

(e) Referring to the charge that the defendant made low prices in order to destroy competition, the Court said that because it had "become possessed" of the plants of various members of the Trade Association, "it had a right to take any *usual* method known in business conducted normally to *preserve all of the trade* which these different companies brought to it" (Trans., p. 2478, fol. 7434)—and this, too, in face of fact that the most "usual" method known to the powder trade (as shown by the evidence) was by cutting prices so low that a competitor could not live outside the combination, and after its surrender raising them high enough to make up the losses. The defendant "was confined to the use of *lawful* methods of business"; but "it had a right to *underbid* its competitors with their own trade", (fol. 7435). And the rule of the "survival of the fittest" is thus announced as a *legitimate* outgrowth of these

price-cutting contests (Trans., p. 2485, fols. 7455-7456):

> "That prices are apt to lower during periods of strenuous competition is one of the usual results and that they will rise again after competition is at an end is likewise a trade axiom; and that the *survivor in the contest is the only one that gets the benefit of such a rise is inevitable.*"

After having laid down these premises, the jury were told that even if they found that the various acts charged were "steps in a general plan", the question then remained (Trans., p. 2490, fol. 7468):

> "Was such plan or purpose to merely protect the *legitimate interests* of the defendant in the trade, that is, was it for the purpose of protecting such part or all of the trade which it had *acquired theretofore* by legitimate means, or which, by reason of its capacity and ability to supply, it was *reasonably entitled to,* in free and open competition; or was it to harass and oppress its competitors so that in the end, be it near or far removed, they would cease to be independent competitors and leave it master of the market? If you find that such protection, and not oppression, was the purpose and the use made of such steps or parts of a plan, then the defendant is not liable in damages simply because as an incident to the carrying out of that plan a competitor was injured in his business or property."

But assuming for the purpose of the argument that the theory of the Court below that this instruction depends upon other and disconnected parts of the charge, is correct, we are brought within the rule that an erroneous instruction is not cured by another instruction correctly stating

the law, where the first instruction is not explicitly withdrawn from the jury.

"When it is proposed by a further instruction to correct an erroneous charge, the purpose *should be stated* and the explanation made so clear as to leave no room for a reasonable mistake."

Louisville & N. R. Co. vs. Johnson, 81 Fed., 679.

"If two or more instructions are inconsistent and calculated to mislead the jury or leave them in doubt as to the law, it is a cause for reversal."

Wenning vs. Teeple, 44 Ind., 189.

Where inconsistent instructions are given, if they cannot be reconciled, the appellant is entitled to rely upon those most favorable to him in aid of his exception.

"Where inconsistent findings are made by a court, if they cannot be reconciled, the appellant is entitled to rely upon those most favorable to himself in aid of his exception. (*Elterman vs. Hyman,* 192 N. Y., 113, 117.) So, where the charge of the court is so inconsistent or contradictory upon a material proposition that is impossible to reconcile the different versions, the appellant should be entitled to rely upon the instruction most favorable to his appeal. Under such circumstances there is no other way to protect a defeated party from the effect of an erroneous charge. While it may be that the jury accepted the first version of the law given to them, owing to its frequent repetition and emphasis, still we have no assurance that they did not rely on the last version and hence they may have done injustice to the defendant."

Johnson vs. Blaney, 198 N. Y., 312, 317.

Where instructions are inconsistent with or contradict each other, it is usually impossible to say whether the jury was controlled by the one or the other.

Instructions which taken as a whole, are calculated to mislead the jury as to the character of the evidence necessary to prove the issue on one side are erroneous.

Rea vs. Missouri, 17 Wall, 532;
Bolen-Darnall Coal Co. vs. Williams, 164 Fed., 665;
Weiss vs. Bethlehem Iron Co., 88 Fed., 23.

It is error to give instructions that are self-contradictory or confusing.

Sweeney vs. Erving, 228 U. S., 233;
Deserant vs. Cerillos Coal R. Co., 178 U. S., 409;
Sullivan vs. Wingerath, 203 Fed., 460.

Does the instruction excepted to state only "indisputable facts."

Further analyzing the opinion of the Court below wherein it says that the language of the excepted instruction is not objectionable because "it states nothing but indisputable facts," we think that a careful consideration of what is there said will not support this position.

(a) The charge begins with the statement, "This suit is unique in many respects." In what way is it unique? Other actions have been brought to recover damages caused by the operations of unlawful monopolies.

(b) The charge proceeds with the statement that the existence of the plaintiff was due to the efforts of R. S. Waddell, who had been long associated with the Du Pont interests as an employee, and that he knew at the time of their unlawful policies and practices, of the comparative size of the defendants' capacity, and of their influence in the trade. These facts being admitted, is it an "indisputable fact" that the rights of the plaintiff to full protection, *under the law*, against such unlawful policies and practices, were in any wise different from what they would have been had plaintiff come into existence in ignorance of these facts, or before this power had been developed?

(c) The charge further recites that the plaintiff does not occupy the same position as a competitor in existence, during the period while this monopoly was being developed or built up? Is this an "indisputable fact?" If so, what was the difference in such relations, *under the law?* Was it that this supposed competitor had the right to recover for injuries sustained because it was an *unwilling* victim, and that the plaintiff could not recover because it entered the contest with its eyes open and, therefore, at its peril?

(d) The charge further recites that "to it (the plaintiff), this influence and power of the defendant, when it, the plaintiff, was launched into the powder field is not in itself actionable, even though that status is due in part to methods which are prohibited by the Anti-Trust Act". Is this an "indisputable fact"? We think it is not even the law. But assuming that it is, in what respect does this fact differ from the rights of "a competitor in existence during the period

that this influence was being developed, and who may have been during the course of such development, as well as after it had reached the height of its power, injured in its business or property by reason thereof?" Would the "influence and power of the defendant" have been "in itself actionable," on the part of the supposed competitor who was in existence while this influence and power was being developed? If not, then plaintiff stands in no different relation under the law.

(e) The charge further recites that before the plaintiff can recover it "must establish that the defendant used its power oppressively," etc. But would not such supposed competitor have been required to establish the same facts before it could recover for injuries sustained by it?

(f) The charge further recites that "the plaintiff does not occupy the same position as a competitor in existence during the period that this influence *was being developed*" and who may have been injured in its business or property "*during the course* of such development," etc., which was equivalent to saying to the jury, that nothing was done by the defendants *toward the development* of the monopoly *during the years 1903-1908*—which was the period while plaintiff was in business. This must have been in the mind of the Trial Court, otherwise the plaintiff could not have been in a different position from the supposed competitor referred to by the Court in the matter of the development of its power and influence, nor would the plaintiff be "here *as one* entering the competitive field *when such growth and influence have been established.*" By necessary implication this must have meant that nothing had been done towards the development of

this influence *during the period of plaintiff's existence,* and it was therefore virtually an instruction to the jury that the plaintiff had failed to establish a fact necessary to be established before recovery was possible. Was this an "indisputable fact"? There was abundant evidence that the development of this power and influence, and its exercise by the defendants continued during this period, and the instruction invaded the province of the jury by limiting them in their right to determine the weight and sufficiency of that evidence.

Is it not perfectly clear that the only rational theory which can be drawn from the language of the Trial Court is that the plaintiff's rights under Section 7 of the Sherman Act were different from what they would have been had it begun business before the defendants had acquired their supremacy in the powder trade, and that because it entered the field knowing the character of the competition which it would have to contend with, it did so at its peril.

It was making a distinction between classes, and in *Loewe vs. Lawlor,* 208 U. S., 274, it was said that: "The act made no distinction between classes."

The Sherman Act did not create any distinction between the rights or remedies of a person injured by an unlawful combination, whether such person or corporation was in existence before the combination had developed its power and influence, or after it had developed such power and influence; or whether it had previous knowledge of such acts and facts, or acquired such knowledge afterward?

Besides it was error to instruct the jury upon a conjectural state of facts.

It was unnecessary and improper for the Court to instruct the jury upon a supposititious case which was not in issue. The question was not what would have been the plaintiff's rights had it been in existence earlier, nor what would have been the rights of some other person who might not have been cognizant of the facts which Mr. Waddell was. The sole question before the Court was, What are plaintiff's rights now?

Chief Justice Tawney in *United States vs. Brietling*, 20 How., 252, said:

> "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered * * *. It may induce them to indulge in conjectures instead of weighing the testimony."

Mr. Justice Field in *Railroad Co. vs. Houston*, 95 U. S., 697, 703, said:

> "To instruct a jury upon assumed facts to which no evidence applied was error. Such instructions tend to mislead them by withdrawing their attention from the proper points involved in the issue. Juries are sufficiently prone to indulge in conjectures without having possible facts not in evidence suggested for their consideration."

POINT V.

The exercise of a legal right cannot be affected by the motive which controls it, however unworthy such motive may be. Therefore, even if it is true, as the Court charged, that Mr. Waddell, one of plaintiff's stockholders, and its promoter and president, was aware of the unlawful policies and practices of the Du Pont Co. and its associates, with respect to competition, by reason of the fact that he had been one of its employes, and that he may have been actuated by the belief that the plaintiff's plant and business, after a severe competitive struggle with the defendants, such as he had known to be carried on in other cases, might be taken over at a considerable profit—this would not afford the slightest excuse in law for the unlawful acts of the defendants, nor affect the right of the plaintiff to secure redress for injuries suffered at their hands.

The Court instructed the jury as follows, which is assigned as error No. 6 (See Trans., pp. 3200-3201):

> "Mr. Waddell, as already stated, was well advised when he promoted the plaintiff company, of the defendant's business, capacity and policies. He had been its agent for a long period during which several severe competitive struggles took place, and he knew the outcome thereof, and which was, generally speaking, the taking over in one form and another of such new comers, and at least in one instance—that of the Indiana—at a con-

siderable profit to the owners of that company.

"Of course, Mr. Waddell, or the company which he formed had a right to go into business, and the motive for entering into such business is of little moment so far as their rights were concerned; *but if he was actuated by the belief that his company would meet with a like experience after some competitive struggles, it may have a bearing upon the question whether the plaintiff was sufficiently capitalized to engage in the struggle for the market already occupied.* Of course, if you find that it was sufficiently capitalized, or that it had sufficient financial backing to weather a struggle carried on under normal or lawful competitive conditions, that is a sufficient answer, and it would make no difference whether it was or was not sufficiently capitalized to meet a competition forced upon it by unlawful means."

The Court below apparently accepts the theory of the Trial Court as being good law, for it upholds this portion of the charge upon the ground (see Trans. 3192, fol. 9574) that the Court was dealing

> "with the question whether the plaintiff had been properly equipped and capitalized—this matter having a direct bearing on the defendants' allegation that the Buckeye enterprise was organized merely to be sold out, and was not intended to be a bona fide factory at all."

Whether the plaintiff was sufficiently capitalized to engage in the struggle was a question of fact, not of intention. It was not to be deduced from Mr. Waddell's intentions, but from what he and the other stockholders and officers of the plaintiff *actually did*. The jury was, in effect, told

that they might *speculate* concerning a question in issue, which could only be determined by facts and figures. If Mr. Waddell had *intended* to disturb the well-laid plans of his employers to completely monopolize the explosives business and to harass and embarrass them and thus force them to buy him out, it would be more in consonance with reason to infer that, knowing the power and financial strength of the competitors he would have to contend with, he would see to it that his company was *abundantly* capitalized instead of insufficiently capitalized; but this would not entitle the plaintiff to urge *this intention* to abundantly prepare himself for the struggle as any evidence of what was actually done in this respect by him and the other stockholders. And he might have intended to get together just enough capital to build a cheap plant, and make a show of competition, and yet he might have *changed his mind* and decided to build up a legitimate and permanent business for himself.

In what way, therefore, could his motives, unless expressed in action, furnish any proof of what was actually done by him? It all depended upon facts and, in the very nature of the situation, facts which were available. The plant was in existence, and the buildings, machinery and equipment were all the subject of expert testimony; the books of the company showing the amount of cash received and expended in building and equipping the plant and in operating it, are in evidence and speak for themselves; the efforts made to get business, the character of the company's salesmen, agents and employes, are all the subject of much evidence. Of all these matters the jury had rightful cognizance *as facts*, from

which they might have arrived at a conclusion, whether plaintiff's failure in business was the result of some influence other than the unlawful conduct of the defendants. But *the intentions* of Mr. Waddell, be they good or bad, worthy or unworthy, could form no basis for such a conclusion, whatever.

The Trial Court had in fact already called the attention of the jury to these pertinent issues thus (See Trans., p. 2492, fol. 7475):

> "As to the properly equipped plant: You have the testimony on the part of the plaintiff as to obtaining a favorable site, and the construction and equipment of the plant, the employment of competent salesmen and the efforts that were made to secure the trade, and the results. You have also the testimony of Messrs. Olin and Pierce as to how they found such plant, and these will be again referred to under the head of damages."

Having said this, the Court at once proceeded to a discussion of the evidence concerning the motives and intentions which actuated Mr. Waddell in organizing plaintiff, and particularly called their attention to a remark attributed to him by Mr. Rice to the effect that he had asked Mr. Rice to join him in going into the powder business for the purpose of "fixing prices"—the inference being that they would thus force the Du Pont Company to buy them out. This remark was flatly denied by Mr. Waddell, and his denial was confirmed by the fact that he and Mr. Rice had been open and avowed enemies, and not on speaking terms even, for nearly thirty years. Mr. Rice himself admitted this to be the fact (See Trans., p. 1842). This same Mr. Rice was agent of the Du Pont Company at Chicago, and assisted in

carrying on the fight against plaintiff, and who Mr. Robert C. Bruce testified had told him "that the Du Pont people could and would put the Buckeye people out of business, regardless of the amount of money to be spent;" (See Trans., p. 2409, fol. 7227) and who Mr. Bruce also testified told him he would cancel his agency for Du Pont dynamite unless he quit buying powder of the plaintiff. (See Trans., p. 2408, fol. 7224.)

The suggestion of the possibility of the mills of plaintiff having been insufficiently equipped and financed to withstand the contest which Mr. Waddell knew was ahead of him, even if well-founded in fact, **would not afford the slightest excuse in law for the unlawful acts of the defendants.**

Even if such a rule could by any construction be applied to Mr. Waddell personally—which is, of course, impossible—how could it be made to apply to the plaintiff as a corporation, and the other stockholders who owned 62 per cent. of its stock? The evidence shows that the $100,000 capital stock of the Buckeye Powder Company was held by about a dozen persons, of which amount Mr. Waddell and members of his family held $38,600 only; that while he, as president of that company, had been the leading spirit in and responsible for its affairs, and was necessarily its chief witness in this action, five other stockholders, namely, Mr. Luthy, Mr. Miller, Mr. Brechnits, Mr. Clark and R. S. Waddell, Jr., gave their testimony.

Furthermore, it must be borne in mind that the Trial Court failed to comment to the jury upon the other and undisputed evidence in the record, which clearly establishes Mr. Waddell's

sincerity of purpose and perfect good faith to found a legitimate business.

He testified (see Trans., pp. 751-752) that after he tendered his resignation, he had a conversation with Mr. T. C. Du Pont, the then President of the Du Pont Company, in which he stated his reasons for leaving the service of the company; and that Mr. Du Pont made several other offers to him to induce him to remain with them:

> "I declined the offer and told him that I would prefer to go into business for myself and establish a business for myself and my sons and I thought it was the proper time to do it. He asked me what kind of business I was going into. I told him I thought I would build a small mill. I thought I had been with the company long enough to earn that right, to have a little business of my own. He agreed with me; said he thought I had."

Mr. Du Pont was himself a witness several times during the trial, but did not dispute this testimony, and Mr. Waddell, was also confirmed by Mr. Luthy, a stockholder, to whom he made a similar statement when Mr. Luthy subscribed for some of the stock. Mr. Luthy testified (see Trans., p. 615, fol. 1845):

> "I first met Mr. Waddell about the time he came to Peoria to locate a plant, and I had several interviews with him in which he went into the powder manufacturing business quite extensively in explaining it to me. He said he had been with the Du Pont people for many years, that he had held an important position there and received a good salary, but he wanted to start a powder plant of his own so he could leave a business to his sons when he died; that he thought his

knowledge of the business was such it would enable him to make a success of it; he said that powder at that time was selling for, I think it was, about $1.35 a keg, and that powder could be produced in the neighborhood of 80¢ or 85¢ a keg and that there was a good margin in the business. That the Du Pont people were large makers of powder and practically controlled the situation, and it would not be likely that they would reduce prices so it would take off the margins; and the prospect looked good to me and I took some stock in the company."

The Court also failed to comment on Mr. Waddell's testimony (see Trans., p. 1556), that in the Summer of 1902—

> "On several occasions Mr. T. C. Du Pont and Mr. Moxham stated to me that the old policy of the old companies purchasing competitors was entirely abandoned, and hereafter no mill would ever be purchased by the Du Pont Company, no competitor would ever be purchased. I understood that thoroughly."

Mr. T. C. Du Pont and Mr. Moxham were both called as witnesses, but did not dispute this testimony.

The Court also failed to comment upon the further fact that Mr. Waddell testified that when he left the Du Pont Company his relations were of the friendliest sort with all of the officers, and that when he announced his purpose to build a powder plant, they offered to join him in the enterprise. Negotiations, with this end in view, were had for some time and failed only because the Du Pont interests insisted upon having stock control of the company, or the handling of the entire output of its mills.

These negotiations are fully described in the testimony of R. S. Waddell (Trans., pp. 751-756, also 1405-1463); also T. C. Du Pont (Trans., pp. 221-228); also A. J. Moxham (Trans., pp. 675-677); also Plaintiff's Exhibits 42 to 51 (Trans., pp. 2565 to 2587).

The following extract, from Exhibit 42, shows the estimate placed upon Mr. Waddell by his employers, at the time of these negotiations, when they were about to go into partnership with him, the same being a portion of an approved memorandum to be executed by Mr. Waddell and T. C. Du Pont (see Trans., p. 2565):

> "WITNESSETH, that whereas R. S. Waddell has been associated with the Powder Company for a great many years past, and whereas his associations with said Powder Company have been entirely satisfactory, and whereas, he recently moved from Cincinnati to accept the position of General Sales Agent of said Powder Company on trial, and whereas that position is not entirely agreeable or congenial to him, and whereas said R. S. Waddell is desirous of building a powder plant and is further desirous of having associated with him the Powder Company with which he has been so long connected, and he is also desirous of owning 51% of the stock of said (————) powder company (hereinafter called the New Company), in his own name and right, and whereas the Powder Company does *recognize the ability and appreciate the long and faithful service of R. S. Waddell*", etc.

The Trial Court also failed to comment on Mr. Waddell's testimony that he had not the slightest suspicion that he would be attacked in the conduct of his business, when he left the service of the Du Pont Company, and that no inkling

of their purpose to fight him reached him until he found that detectives were following him—which information first came to him through the finding of a letter from the Pinkerton Detective Agency to one of its representatives in Cincinnati, which disclosed the fact that he was being shadowed. (See Point VII.)

If the alleged blackmailing scheme was ever in contemplation by Mr. Waddell it certainly never materialized, for the proof is totally lacking that he or anyone for him ever attempted to dispose of plaintiff's property and business until in 1907, *after it had been practically driven* out of business. At this time Mr. Luthy, a stockholder, acting upon his own initiative, made the attempt to induce the Du Pont Company to purchase the property as a means of realizing something on his stock. (See Trans., p. 617, fol. 1851.)

Mr. Luthy describes his experience in the several interviews he had with T. C. Du Pont, P. S. Du Pont and A. J. Moxham, the two latter displaying much vindictiveness toward Mr. Waddell (Trans., pp. 617-619).

The exercise of a legal right cannot be affected by the motive which controls it.

> "The propriety of such an instruction may well be doubted. What the jury would understand by it is certainly questionable. It may well be that some jurymen would understand, that, even if the plaintiff had a valid claim against the defendant, still if his only object in bringing the action was to hinder and oppress the defendant, and otherwise the action would not have been brought, the plaintiff could not recover. This is not the law. **The motive of the plaintiff cuts no figure, if**

he is doing a lawful act, and the bringing of an action on a valid claim is an entirely lawful act."

Sullivan vs. Collins, 107 Wis., 291; 83 N. W., 310.

In *Connolly vs. Union Sewer Pipe Co.,* 184 U. S., 540, a similar question was raised. Connolly was sued to recover on certain promissory notes given by him in purchase of sewer pipe. He set up a special defense that the plaintiff was a trust or combination acting in restraint of trade, contrary to the provisions of the Sherman Act.

Justice Harlan quotes from *Strait vs. National Harrow Co.,* 51 Fed. Rep., 819, the following language which aptly states the point involved here:

"Such a combination may be an odious and a wicked one, but the proposition that the plaintiffs, while infringing the rights vested in the defendant under letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor, because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it by its title to the letters patent, is a novel one, and entirely unwarranted. The party having such a patent has a right to bring suit on it, not only against a manufacturer who infringes, but against dealers and users of the patented article, if he believes the patent is being infringed; and the motive which prompts him to sue *is not open to judicial inquiry,* because, having a legal right to sue, it is immaterial whether his motives are good or bad, and he is not required to give his reasons for the attempt to assert his legal rights. 'The exercise of the legal right cannot be affected by the motive which controls it.' "

Judge Gray, speaking for the Circuit Court of Appeals of the Third Circuit, followed the authority of the *Connolly* case in *Northwestern Consolidated Milling Co. v. Callan & Son*, 177 Fed., 786. The complainant was a corporation engaged in the manufacture of flour under the name of "Ceresota," which was a registered trade-mark, and had expended a large sum of money in advertising the name, and had built up a large trade. The defendants also operated a flour mill and began to use the word "Certosa" as a trade-mark. In an action by the complainant against the defendants for infringement of their trade-mark the defendants answered that the complainant was organized and operating in violation of the Sherman Act, and was therefore not entitled to any relief. The Court said:

> "The matters referred to in the petition of defendants have no relevancy here. The Sherman Act has its own penalties for violations of any of its provisions. It contains nothing that sanctions the argument that an offender against it shall be deprived of redress for a civil injury on *the plea that he has been guilty of an infraction of that Act which gives a remedy to one injured in his business or property against the transgression of the law*, and does not suggest that one who has taken the property, infringed the trade-mark or patent of another, or refused to pay debts because of an alleged transgression of the Sherman Act by the creditors, can invoke that Act as a defense to liability either in suits in tort or contract."

Independent Baking Powder Company v. Boorman, 130 Fed., 726, also tried before Judge Gray in the Circuit Court, was an action for infringement of a trade-mark, and the defendant set up

that the complainant had acquired the trade-mark as the result of a conspiracy in violation of the Sherman Act. Judge Gray, after stating that the issue with which the Court must be finally concerned was the right of the complainant to an exclusive property in the trade-mark, said:

> "So far as the portions of the answer excepted to charge a conspiracy between complainant and the Royal Baking Powder Company and others, if others there be, for the purpose of erecting a monopoly in restraint of trade between the states, and in alleged violation of the act of Congress, known as the 'Sherman Act,' the same are clearly impertinent and irrelevant. They throw no light upon the real issue, but by introduction of the collateral issue, *tend to embarrass and to confuse* a consideration of the same."

This instruction implied a scheme of blackmail on the part of Mr. Waddell, and if believed by the jury, they could, on its authority alone, easily have made it their basis for determining their verdict. It was the introduction of a "collateral issue," and as was said by Judge Gray, it tended "to embarrass and confuse a consideration" of the real issues. It rose to the dignity of being itself the real issue to be determined by the jury, and was, no doubt, so regarded by them.

POINT VI.

The law of competition does not mean a "fight" of extermination between dealers, in which the victor is entitled to the "spoils," but encourages individual traders to engage in fair rivalry to the end that each may receive a fair profit, and the public be protected from excessive charges.

The Court gave the following instruction, which is assigned as Error No. 7 (see Trans., p. 3201, fol. 9603):

> "No one who enters into a competitive field is guaranteed that he will get any particular share or even a share of the business at a profit, nor does the mere fact that the largest competitor is able to prevent a smaller one from getting a profitable share of the business make it liable in damages to such other. Competition, as it exists *under the laws* at this date, has within it *the element of fight.* It permits fighting so long as it is fair and it permits the fair fighter *to go away with the spoils,* even though some one in that fight *has been injured,* and perhaps *irretrievably injured* in consequence; so that it is not the mere fact that a competitor suffers injury through severe competition that makes the other competitor who may have come out of the fray successfully, liable to compensate for the losses sustained by the injured party."

In this brief paragraph we find "fight," "fighting" "fighter," "spoils," and "irretrievable injury" not only excused, but described as being within the law as it exists to-day.

It hardly seems possible that the Court could have used words which would have more certainly carried the conviction to every juror's

mind that competition, as understood *in the law*, meant ruthless warfare in which the belligerents might plunder each other without limit, and that, as legitimate booty and loot, the successful party could retain the supremacy in the trade which his strength in overcoming the enemy enabled him to acquire, if he but observed certain established rules and fought "fair."

To say that the law "permits the fair fighter to go away with the spoils, even though some one in the fight has been injured, and, perhaps, irretrievably injured, in consequence," carries with it the idea of the prize ring, where the contestants give and take blow for blow, in an effort to administer the final "knockout." If the successful antagonist has but "fought fair"—that is, has observed the Marquis of Queensbury rules—the prize money, the gate receipts, the moving picture royalties, and all the other "spoils" are his, under the law of the prize ring.

Such an idea, as applied to business conduct, is repugnant not only to the spirit of the times, but is unsound in law and morals. It is to set at naught the whole object and purpose of the anti-trust laws.

The language of the Court is more especially susceptible to the injurious effect which we claim for it because some of the methods followed by the defendants in acquiring their supremacy in the trade, and in forcing competitors out of business, come within the accepted understanding of the words "fight," "fray" and "spoils". And its harmful character was accentuated by the fact that it was given at the end of a lengthy review of some of these acts. (Trans. pp. 2489-2490.)

Competition is necessarily a contest, but it is

not a "fight," in any just sense, nor a contest for "spoils," nor, under the law, is either contestant permitted to inflict "irretrievable injury."

Such an instruction is entirely out of place in an action of this character, which is based upon a statute that provides a remedy for all injuries whatsoever, which have been caused by a *combination* of competitors, and the very object and purpose of which is to protect the weak from attacks by the strong. The mere *inequality* of the contest means the certain overthrow and extinction of the weaker of the two contestants, no matter how "fair" the fighting is. But this instruction gives legal sanction to the rule of the "survival of the fittest," which as now understood means the survival of the *strongest.*

The word "competition" has not been often judicially defined. But in *United States vs. Union Pacific R. R. Co.,* 226 U. S., 61, 87, Mr. Justice Day said:

> "To compete is to strive for something which another is actively seeking and wishes to gain."

The legitimate advantages of competition have often been pointed out in the decisions, and none of these bear any semblance to "spoils," nor do the methods by which they may be obtained, under the law, take on any of the aspects of a "fight."

Among these may be instanced: Rivalry between competing manufacturers to improve the quality of their goods; between competing common carriers, in superiority of service, and accommodation of the public.

In *United States vs. Union Pacific R. R. Co.,* 226 U. S., 84, 87, Mr. Justice Day, speaking of

the kind of competition, which *under the law*, should obtain between rival common carriers, said that it did not consist only in making rates—

> "But includes the character of the service rendered, the accommodation of the shipper in handling and caring for freight and the prompt recognition and adjustment of the shipper's claims. Advantages in these respects were the subjects of representation and the basis of solicitation by many active, opposing agencies. The maintenance of these by the rival companies promoted their business and increased their revenues. The inducement to maintain these points of advantage—low rates, superiority of service and accommodation—did not remain the same in the hands of single dominating and common ownership as it was when they were the subjects of active promotion by competing owners whose success depended upon their accomplishment."

Is there any "element of fight" or "fray" in these advantages which the law encourages for the benefit of the shipper? Are the benefits which might accrue to the carrier who most nearly succeeds in furnishing those advantages to the shipper, in any just or commonly understood sense, "spoils?" It is a perversion of the English language to say so.

Furthermore, the instruction entirely overlooked the rule that what the law permits, or does not forbid, an individual to do, it expressly forbids a combination of individuals doing.

This distinction between the privileges which the law allows to an individual competitor and which it denies to a combination of individuals, was one which was entirely lost sight of by the Court during the trial, and is expressly repudiated in its instructions to the jury.

A combination of individuals engaged in interstate commerce is a veritable outlaw. It has no right to exist. And whatever it does "by reason" of which any person suffers injury, must be compensated for. If Section 7 of the Sherman Act does not mean this, what does it mean? It says:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of *anything* forbidden or declared to be unlawful by this act, may sue therefor," etc.

We submit, that, as a matter of law, in a suit where the whole contention is that any and all injuries which may be suffered by reason of the competition induced by a *combination* of individuals engaged in interstate commerce, such injuries must be compensated for regardless of whether the acts which caused them were "fair" or "unfair," and regardless of whether such acts might have been in themselves lawful.

Its very existence is "forbidden" and "declared unlawful." If, by reason of *such existence* alone any person suffers an injury, no matter how "fair" its methods may be, he is entitled to compensation therefor.

That the doctrine above contended for is the doctrine of the cases, does not admit of a doubt. It has been several times held by this Court that it is not alone the actual *doing* of the prohibited thing which the anti-trust acts strike at, but the *power* to do it.

For example, in the *National Cotton Oil Company vs. Texas*, 197 U. S., 115, 129, Mr. Justice McKenna said:

> "It is the power to control prices which makes the inducements of combinations and

their profit. It is such power that makes it the concern of the law to prohibit or limit them."

In *Swift v. United States*, 196 U. S., 375, it was said:

> "Where acts are done with an unlawful intent and an unlawful combination results, the offense is committed, *even though the acts done are in themselves perfectly innocent and lawful.*"

Mr. Justice Peckham in the *Trans-Missouri case*, 166 U. S., 290, 322, said:

> "It is true the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggrandizement, as against the public interest. In business or trading combinations *they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured,* by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may, nevertheless, be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital."

In *Monarch Tobacco Works v. American Tobacco Company*, 165 Fed., pp. 774, 780, it was said:

> "But whatever is done by those engaged in

the scheme or plot with the motive and intent to carry out the unlawful purpose itself becomes tainted with the illegality of the scheme, however innocent it might otherwise have been, the separate acts becoming thereby so interwoven with the unlawful scheme as to cause the injury 'by reason' of the combination, within the language of Section 7. It, therefore, seems that a series of acts, each of which may be innocent in *itself* may be wrongful if the direct object, purpose, and result thereof be to carry into effect a combination agreement whereby the free flow of commerce between the states, *or the liberty of a trader to carry on his business, be obstructed.*"

POINT VII.

Evidence relative to the purpose of the defendants in the employment of detectives to shadow Mr. Waddell while he was selecting a site for plaintiff mills, even though it may have been of a circumstantial nature, should have been received by the Court.

The allegations of the Amended Declaration are that the defendants placed detectives on Mr. Waddell's track for the purpose of carrying out their plan to retain their monopoly of the powder trade, they having failed in their efforts to dissuade him from starting his plant "to shadow him throughout the United States as he should journey from place to place in search of a location, to keep them advised of his movements and to enable them through their emissaries to forestall him in obtaining a location; and to create opposition to the location of plaintiff's plant in such place as might

be decided upon, by instilling fear into the minds of the people thereabout, and also, if need be, by entering into competition with the plaintiff for the purchase of sites and bidding up the price of said property, not, however, with any purpose to make use of the same themselves, but to prevent the entrance of an independent competitor for the powder trade in the states, territory and foreign country aforesaid, and with a view of altogether preventing plaintiff from finding a site for its mills and plant; that by reason of the matters and things set forth in this paragraph the said Waddell was compelled to travel from place to place with great secrecy, and sometimes under assumed names and to adopt various disguises to avoid being interfered with" (See Trans., p. 10, fol. 30).

The Court instructed the jury as follows, which is assigned as Error No. 8 (Trans., p. 3202):

> "There is no evidence whatever which would justify you in finding that the defendant hired detectives to track Mr. Waddell for the purpose of forestalling him in the purchase of a site, and to create opposition among the people to the location of plaintiff's plant in any place by instilling fear or otherwise, or by bidding up the price of any property plaintiff might have desired to acquire so as to prevent the entry of a competitor into the black powder business. The fact, however, that detectives were employed by the defendant to shadow Mr. Waddell after he had severed his connection with the defendant, and after his declaration to embark in a competitive business, is a circumstance to be considered by you in connection with the other testimony in the case upon the alternative questions whether it shows a hostile purpose upon the part of the defendant against Mr. Waddell's con-

templated enterprise with the view of suppressing competition, or whether it was but a step taken by the defendant in the protection of its legitimate interests, namely, to prevent their employees from being taken from them by this prospective competitor, which latter is the explanation offered on behalf of the defendants."

There was sufficient evidence in support of these allegations to show that they were well founded.

Mr. A. J. Moxham, a Vice President of the duPont company and at the head of the "Development Department," while testifying as a witness for plaintiff, on direct examination, stated that when Mr. Waddell came to leave their employ detectives were put on his track upon the order of William S. Dwinnelle, his assistant, since deceased; and that he caused them to be discharged after they had been in service for a few weeks. (See Trans., pp. 676, 677.)

Mr. T. C. duPont testified that these detectives were sent out by the *Pinkerton Agency* and were employed from Feb. 3 to Feb. 26, 1903. On cross-examination he was asked why they were employed and he answered:

> "It was done because our people felt that some of our employees were trying to be gotten away from us by Mr. Waddell, and after three weeks they found that it was not true and they took them off." (See Trans., pp. 244-245.)

Upon redirect the following occurred (See Trans., p. 278):

> "Q. You say some of your people thought that Mr. Waddell would endeavor to entice your employees away. Who were those people that thought this thing about these employees?

A. I don't remember just who it was said that to me.

"Q. Can you tell who the employees were that these people thought he was going to try to entice away? A. No, I can not.

"Q. Do you know where these employees resided that they thought he was going to entice away? A. I said I didn't know who they were, so I could not tell you where they resided.

"Q. Do you know whether any of these employees resided in the State of Illinois? A. I do not know.

"Q. Do you know whether any of them resided in the State of Ohio? A. I do not know.

"Q. I ask you whether any of them resided in the State of Missouri? A. I don't know who they were."

It must be remembered that at this time Mr. Waddell had not found a site, had made no preparations even to begin business, and had no need of Du Pont employes.

That the reason given by Mr. duPont was not the real reason is established by the fact that Mr. Waddell left Wilmington on the 5th of February, went direct to York, Penn.; from there he went to Chicago, and from there to Cincinnati. At Cincinnati he was handed the letter set out below; it was signed by J. H. Schumacher, a Superintendent of the *Pinkerton Detective Agency,* which accorded with the testimony of T. C. duPont that the detectives whom the duPont Company employed were sent out by that agency. Mr. Waddell further testified that after he received this letter he went down to the Stratford Hotel in Cincinnati and found the party referred to in the letter; that he then slipped away quietly from Cin-

cinnati, leaving his trunk at the hotel and his hotel bill unpaid for a couple of days, so as to throw the detectives off the scent, but directing his son his to pay the bill and giving him an order for his trunk to be forwarded later; he then travelled through Illinois, and part of Missouri under his middle name of W. R. Stewart, looking for sites, and avoided all public appearance as much as possible and finally arrived at Peoria, Ill., where he found the site afterward used by him (See Trans., pp. 756-761).

It was a proper question to be submitted to the jury whether the fact that Mr. Waddell disguised himself and travelled under assumed names and in this manner eluded the detectives, was the reason why they were unable to carry out their intention to obstruct him in the manner alleged in the Declaration it was their intention to do.

Mr. Waddell did not know that he was being shadowed until the following letter was fortuitously picked up in the Post Office in Cincinnati, and turned over to him. The Court refused to receive the letter, which is assigned as Error No. 9. (See Trans., p. 3203.)

"Chicago, Feb. 13, 1903.

"H. A. Koach, Esq.,
"c/o Stratford Hotel,
"Cincinnati, Ohio:

"Dear Sir—This will be handed to you by Capt. H. R. Saville of the Philadelphia Agency, who has been engaged in shadowing the party I wired to you about in cipher, as follows:

"'Wire immediately if R. S. Waddell of Wilmington, Delaware, is now in Cincinnati; think can be found South East corner Third and Broadway. Want to place shadow; therefore, inquiry carefully.'

"and to which you replied as follows:

"'Mail at party's office Union Trust Building indicates he will arrive tomorrow. He has home and family in this city.'

"Will you kindly assist him as much as possible in locating the party, and just as soon as he locates him, he is to wire to Chicago for assistance.

"Yours truly,

"(Signed.) J. H. Schumacher,
"Sup't."

It was for the jury to say whether the facts above recited constituted *any* evidence that these detectives were placed on Mr. Waddell's track for *any* of the purposes stated. The reason given by Mr. T. C. duPont, in view of the fact that these detectives followed Mr. Waddell over so wide a territory, and that the evidence fails to show who the alleged employees were that they were afraid he would entice away, or that any employees of the Du Pont Company were in that territory, is unreasonable and unbelievable; and the reasons stated by plaintiff why the detectives were employed is much more in keeping with the other facts in the record. The whole question, including the letter, should have been submitted to the jury instead of their being told that there was "*no evidence whatever*" for them to consider.

POINT VIII.

Wherever necessary to drive a competitor out of business the defendants sold their products below cost.

The plaintiff alleged that, as one of the means adopted by the defendants to obtain and maintain a monopoly in the powder trade, in those states, territories and foreign countries where they were in full control of the powder trade their prices were always fixed *so as to leave substantial and sometimes excessive margins of profit,* but that in those states, territories and foreign countries where they were doing business in competition or in danger of competition their prices were regulated with a view of preventing other manufacturers from obtaining a fair proportion of the powder trade and not with a view of obtaining a fair profit, so that when their competitors should be compelled to retire from business they could make any price they should thereafter see fit; and further that it was continuously forced to meet the prices thus fixed by the defendant duPont Powder Company during the entire period of its existence, and that it "was unable to offer to supply such powder at any price below which said defendant would not go, and wherever and whenever the business of the consumer was submitted for bid, or to competition, in almost every case, the said defendant would underbid plaintiff by persistently reducing its price at from five to ten cents per keg, and thus not only depriving plaintiff of said business *but sometimes making sales at an actual loss;* that in this manner, plaintiff would ultimately be compelled to surrender the business of such consumer and leave the said defendant a clear field to make up its loses by fixing

any price it might thereafter see fit." (See Amended Declaration, Trans., pp. 24-25.)

The court instructed the jury that there is *"no evidence* that would sustain the allegations made by the plaintiff that the defendant * * * sold its product below actual cost; * * * and you will therefore *disregard them entirely* in your further consideration of the issues here being tried."

This instruction is assigned as Error No. 12. (See Trans., p. 3204, fol. 9611.)

It is difficult indeed, to understand how the court reached this conclusion in view of the record as follows:

Mr. Waddell, the President of the plaintiff, testified that the duPont Company sold black blasting powder at less than cost. (See Trans., pp. 812-813, fols. 2436-2437.)

> "Q. Do you know of any instance, of your own knowledge, where the duPont Company sold its powder to any consumer of black blasting powder at less than cost? (After argument.) A. Yes.
>
> "Q. Now will you give the circumstances by which you know that to be the case? A. In the cases where they sold powder at ninety cents—ninety-two cents—in all cases of that kind, and in many cases where they sold at ninety-five cents delivered, where the freight rate was high and in the district in which I operated."

This testimony of Mr. Waddell is supported by the testimony of the defendants' own officers and employees and by various exhibits which were received in evidence. Foremost of these is Plaintiff's Exhibit No. 1248, (See Trans., pp. 2735-2745) known as the "95 cent price list" (described supra, p. 92) which was made up from the

files of the Du Pont Powder Company, and brought in by Mr. Coyne, its Directors of Sales, shows that that Company between the 5th day of May, 1905, and the 8th day of October, 1907, *made a price* of 95 cents per keg for blasting powder, to *four hundred and forty-five* consumers of black blasting powder in the States of Ohio, Indiana, Illinois, Kentucky, Missouri and Kansas, and that it actually made *sales*, at that price, to 154 such consumers. (See Trans., pp. 1601-1602.)

Furthermore this exhibit shows that the duPont Company made or renewed *eighty-six contracts* at 95 cents per keg, so that they not only made *one* sale to each such customers, or filled one order at 95 cents, but they sold such customer many orders for a *period* of years at this price.

In the case of Mr. Brechnitz, a merchant of Bellville, Ill., who had a large trade in explosives among the mine owners in that region and who was a customer and stockholder of plaintiff, the Du Pont Company finally secured his business and got him to enter into a long-time contract by offering him a price which was equivalent to 91¾ cents. The price was *nominally* 95 cents, but the use of its magazine was given to him, which meant, as he testified, 3¼ cents a keg to him in saving of drayage. (See Brechnitz, Trans., p. 551, fol. 1653.)

Mr. Waddell testified that black powder could not be made and sold at a profit at 95 cents per keg (See Trans., p. 2424.) and Mr. Haskell, speaking authoritatively for the duPont Company as its Vice-President having actual charge of determining all questions of cost and price (see Trans., pp. 1937-1940), stated that prior to 1907 and early in 1907, he learned that the plaintiff

was selling its nitrate of soda—which is the principal ingredient of blasting powder—and that the duPont Company thereupon ceased to have any further interest in Buckeye Powder Company's competition, because it "preferred to do a nitrate business more than powder business, and that it was not worth while to consider their quotations at all". Thereupon the following occurred (See Trans., pp. 1938-1940):

"Q. The fact is, however that at the then price of nitrate of soda it was impossible to make powder and sell it at a profit of 95 cents? A. *Yes;* but the Buckeye was not buying nitrate of soda. It had nitrate of soda which it had bought at much lower prices, at which it could make a profit.

"Q. I understood that to be your answer. But exclusive of your conclusion in the matter my question is whether powder could be sold at a profit at 95 cents at the then price of nitrate of soda, regardless of the other conditions which you state in your answer? A. Under certain conditions, yes.

"Q. Tell me what those conditions were? A. Provided the business was sufficiently close to the mill and a fair volume of output was maintained.

"Q. But you think it would have been possible for a company to have manufactured powder and sold it in a normal, natural way, in the normal natural market, and have made money at 95 cents? A. At that time the market was not normal.

"Q. In your judgment, could the Buckeye Powder Company have made powder at the then price of nitrate of soda and sold it at 95 cents, at a profit, anywhere within the district which it would have normally reached? A. If it had accumulated a *near-by business* through having won the regard of its customers, and by making good powder, it could

have sold trade near Peoria at the then existing price of nitrate of soda and made some money.

"Q. You think it could have done all those things and made a profit provided it could have sold it to a little near-by trade, where it could have carted; is that the idea? A. No; there is a large trade around Peoria.

"Q. Then your contention is that if it had confined itself to a *narrow area within which it could sell, without much expense in the way of freight, it might have made some profit at 95 cents*? Just answer that question yes or no, will you, and then explain it. A. I think it could have made some profit.

"Q. Do you wish to explain it? A. I would assume that if the conditions of the Buckeye Powder Company had been normal, it could have continued as an active business concern for the purpose of manufacturing and selling powder, when the 95 cent prices were being made by us and others in exceptional cases *it would have possessed certain other trade at higher prices* which would have enabled it to have manufactured at such a rate that it could have sold *a portion* of its output at 95 cents without loss."

Mr. Waddell's testimony that he "could not make powder and sell it at a profit within the Peoria District at 95 cents," was based on actual experience and the theory here advanced by Mr. Haskell which would confine the Buckeye Powder Company to "nearby business" is fully answered by the evidence which shows that within the entire Peoria District, there is a total consumption of black blasting powder of only 85,000 to 95,000 kegs per year, and that the greater part of this was *under contract* to the duPont Powder Company. (See Trans., pp. 2423-2424.) So that if the plaintiff could have secured all of this

trade, it would not have been able to operate its plant at more than about one-third of its capacity. Furthermore, it was in this District that miners of several operators who were not under contract were kept in a ferment of opposition to the use of Buckeye Powder by the paid representatives of the duPont company. (See discussion of this subject elsewhere in this brief, infra, Point IX, and particularly at pp. 202 et seq.)

Mr. Brewster, a former employee of the duPont Company, in its Competitive Division, testified that Mr. Haskell told him, just before the 95 cent price was authorized in 1905, that *"Competitors could not make powder at a profit at 95 cents."* (Trans., p. 2401, fol. 7203.) Mr. Haskell was afterwards called as a witness but did not deny that statement.

Mr. Patterson, also one of the Vice Presidents of the duPont Powder Company, while a witness for plaintiff and under cross-examination, was interrogated with respect to the competitive policy of his Company in meeting the prices of others. He stated that their policy was to *meet* prices, but not to make *lower* prices than others, their managers and salesmen believing, as he stated, "that they could hold their own if they had equal prices." And thereupon the following occurred (Trans., p. 186.):

> "Q. Now, in the matter of meeting prices, supposing the competitor went away down, was there a point at which it stopped following him? A. Yes.
>
> "Q. What was that point? A. Well, we fixed the limit, and we lost a great deal of business, from my recollection.

"Q. What were the considerations that fixed that limit, below which you would not go? A. Well, the limit of profit.

"Q. In other words, you would not sell below cost; is that it? A. That was our aim.

"Q. And so far as you know, you never did, did you, Mr. Patterson? A. *Over the whole country,* do you mean?

"Q. Yes. A. No, sir.

"Q. During this period? A. No, sir; taking the country *as a whole,* I think we never did."

Upon redirect examination he was questioned further in regard to this statement as follows (Trans., pp. 188-189):

"Q. You stated a moment ago that taking the country *as a whole* you thought you never had sold below cost? A. That is my impression, Mr. Abbott.

"Q. Will you state in what particular portions of the country you may have sold below cost? A. In what?

"Q. In what particular portions of the country do you think you may have sold below cost? A. Well I think it was a pretty close question whether they would run on the prices made, considering the business that we had *in the anthracite district.* I think including *the rest* of the country we made money.

"Q. Can you give any particular instance in which you sold below cost? A. No, sir; I cannot.

"Q. Can you give any particular state in which you sold below cost? A. No, sir.

"Q. Can you give any particular customer to whom you sold below cost? A. No, sir.

"Q. Upon what do you base your impression that you did sell below cost at some time or some place? A. I think my recollection is that from the *net result of the business in 1906,* Mr. Abbott, we made a *very small margin of profit,* but we did not lose money.

"Q. That was on your *whole* business? A. On the *whole* business, yes, sir.

"Q. That was on the business where you sold *at a profit* as well as on the business that you sold *at a loss*? A. Taking it *as a whole*; yes sir.

* * * * *

"Q. Were any of those cases in the State of Illinois? A. *I think that district was very close to cost, because of the competitive conditions; yes, sir.*"

This directly supports plaintiff's allegations that the defendants maintained lower prices in competitive districts, even to selling at a loss, making up the loss in those districts where competition did not prevail.

That it was a long-established policy to sell below cost in every contest with competitors if it became necessary to do so in order to get the business is overwhelmingly shown by the evidence adduced by the defendants themselves. Instances of sales made below 95 cents are given and appear in the correspondence over and over again during the long cross-examination of Mr. Waddell.

During the contest which prevailed from 1891 to 1896, just before the "Round-up" prices were cut from $1.45 to 80 cents. (See Trans., p. 1047, fol. 3141; p. 1098, fol. 3292; p. 1136, fol. 3408; p. 1147, fol. 3440; p. 1156, fol. 3468; pp. 1157-1163; p. 1200); and before it ended in 1896 it sold as low as 75 cents. (Trans., p. 1011, fol. 3032; pp 1048-1049, fols. 3144-3145; also p. 1074; fols. 3221, 3222; p. 1174, fol. 3521.) Offers were made as low as 76, 75 and 67 cents (p. 1173, fol. 3518).

The competing companies were "see-sawing" and alternating 5 or 10 cents all the time, and the "associates" had the business at the end of

the fight, in 1896 when the "round-up" came. (Trans., p. 1058, fol. 3173; pp. 1074-1075, fols. 3221, 3223; p. 1090, fol. 3270; p. 1116, fol. 3348; p. 1138, fol. 3414; pp. 1194-1195.)

The general summary of several day's testimony in which counsel for defendants clearly established these prices as having prevailed in various districts appears at pp. 1206, 1210, fols. 3618-3629 of the Transcript.

Mr. Haskell also testified that the contest which prevailed in 1895 brought the price down to 78 cents a keg, and that there was *no profit in it at that price.* (Trans., p. 1618, also pp. 1751-1752, fols. 5253, 5255.)

POINT IX.

The evidence showed that the greater part of black blasting powder was used in coal mining operations, and that the mine operators purchased it in quantities and resold it to the miners as needed, receiving a considerable profit therefor; that the miners reserved the right to select the grade or brand of powder to be used; that for some years it had been the practice on the part of some manufacturers of powder to employ influential miners to circulate among the men in the mines and induce them to reject competitive brands; that cash, intoxicating liquors, etc., were sometimes used with the miners to accomplish this purpose; that this practice was used very effectively by the defendant Du Pont Company through its employes and agents, to drive plaintiff out of business, and at least five specific instances were furnished (one of which resulted in a general strike against plaintiff powder due to misrepresentations made by a salesman of the Du Pont Company), and much general evidence was produced from which this inference necessarily resulted. Notwithstanding all this evidence, the Court withdrew the whole question from the jury, on the ground that there was no evidence to support it.

The Court instructed the jury as follows, which is assigned as Error No. 12 (See Trans., p. 3204, fol. 9610).

> "There is no evidence, gentlemen, that would sustain the allegations made by the plaintiff, that * * * cash, intoxicating liquors, household goods and clothing were distributed among miners to secure their influence with their fellow workmen to effect boycotts, * * * and my instructions to you are, as to these particular allegations, that they have not been established, and you will therefore disregard them *entirely* in your further consideration of the issue here being tried."

To make the matter stronger, when the exception was taken to this instruction, the court stated:

> "You may take an exception. *I withdraw that question* from the jury." (See Trans., pp. 2518, fol. 7554.)

Allegations of the Declaration.

The allegations of the declaration recite that the business of producing coal in the Middle West was conducted primarily under an agreement which existed between the Association known as the Coal Operators Association and another Association known as the Miners' Union; that by the terms of this agreement the Operators Association were to keep on hand a supply of powder which was to be used by the miners in conducting their mining operations and that this powder was to be supplied to the miners from time to time as they might require it at $1.75 per keg; that this price was fixed and unchangeable during the life of the agreement; that the Miners reserved the right under the agreement,

to select the grade or make of powder that the Operators must purchase; that the defendant Du Pont Powder Company, at various times after plaintiff's plant went into operation, employed evilly disposed persons to enter the mines of Operators who had made purchases of black blasting powder of plaintiff, for the purpose of stirring up discontent among the miners and to instill in their minds prejudice against said powder, and to cause them to refuse to use it, and thus compelling the operator to cease his purchases of plaintiff, intending and planning thereby to secure the business for itself; and that this sometimes led to the discontinuance of its use by operators through fear of shut-downs and idleness; that in order to foment unjust opposition and strife "influential miners were employed to make use of their influence with their fellow-workmen to induce them to boycott such powder; that in some cases intoxicating liquors were distributed among said miners, sometimes clothing, food and household articles were distributed among said miners and their families, and sometimes cash was paid to various of said miners to obtain their co-operation and influence with their fellow-workmen as aforesaid". (Trans., p. 19.)

The Court placed the burden very emphatically and unmistakably on the plaintiff, of catching the defendants in the very act of passing the money to the miners, as, for example, the following extract from the record shows:

Mr. J. G. Miller, a broker in Chicago who handled powder manufactured by plaintiff, was testifying concerning the factors which operated to prevent him from selling such powder, when the following occurred. (See Trans., p. 310):

"Q. Now, coming down to the other matters which you found operated to prevent you selling powder, if there were any, will you state what you learned of your own knowledge with reference to any influence which was used with the miners to induce them to object to the use of Buckeye powder? (Objected to.)

"Q. Let me ask you whether you had any personal knowledge of anything done by anybody to influence operators against the use of your powder other than what you obtained from such persons? A. You mean someone in the act?

"THE COURT: Yes.

"A. No, sir.

"MR. ABBOTT: Will your Honor confine us to that line of inquiry from the witness?

"THE COURT: At this time, yes."

But this burden was so well sustained that it is very difficult to know how to summarize it briefly. To us the evidence seems overwhelming, and we are at a complete loss to understand the reason for the above instruction.

The testimony was both of a general and specific character in support of these charges.

The *general* evidence is summarized and discussed below under the following heads:

(a) Relating to the employment of "Howlers" as a long-established policy and practice of the duPont Company—these "Howlers" being influential miners who were employed in mines where competition to duPont powder prevailed, for the purpose of "setting up a howl" against the use of competitive powders.

(b) Relating to the general opposition which was stirred up against the use of Plaintiff's powder on the part of the miners, particularly in mines located in the Springfield and Peoria dis-

tricts in Illinois—the evidence covering incidents at many mines in each of these districts.

The *specific* evidence is summarized and discussed below under the following heads:

(a) Relating to the Clark Coal & Coke Company Mines at Peoria, Ill.

(b) Relating to the Howarth & Taylor Mines at Edwards, Ill.

(c) Relating to the Maplewood Coal Company's Mines at Cuba, Ill.

(d) Relating to the Applegate & Lewis Mines at Hanna City, Ill.—known as the "Thrush Incident", because of the activities among the miners at this mine against plaintiff's powder on the part of a miner named William Thrush.

(e) Relating to the Great Northern Fuel Company's Mines at Novinger, Mo.—known as the "Spicer Incident", because of the activities of Mr. C. B. Spicer, a DuPont salesman, in bringing about a strike among the miners at these mines to force the owners to cease the use of Plaintiff's powder.

Comments by the Court on this Evidence.

After having given the broad and positive instruction that there is "no evidence" to support these allegations, and withdrawing the entire question from the consideration of the jury, the Court commented at length on the evidence involved in the "Thrush Incident" and in the "Spicer Incident", (See Trans., pp. 2463-2470, fols. 7389-7409) but made no reference to the other evidence above outlined.

The reason for these comments is not clear. It would seem that having told the jury that there was "no evidence" to support these alle-

gations, and having withdrawn the whole question from the jury, the Court would have avoided making any further reference to the evidence relating to any of these matters.

These comments are the more difficult to understand for the reason (as will be seen below) that the evidence in the "Thrush Incident" was conclusive that Mr. Thrush was paid *in cash* five cents per keg as a commission on every keg of duPont powder used at the mines, his business being to influence the miners not to use plaintiff's powder, which the owners of the mine were desirous of using because of the good results which it produced, and for other business reasons. By reason of his influence among the miners, he was able to create so much opposition to the use of Buckeye powder that the mine owners were compelled ultimately to abandon their efforts to use it.

In the matter of the "Spicer Incident", the evidence was also conclusive that the "union" sentiment among the miners employed at the Great Northern Fuel Company's mines was very strong; that the plaintiff had a contract with the Fuel Company to supply all the powder required for its uses; that this powder proved satisfactory in its use, both to the mine and to the men; that Mr. Spicer, a duPont salesman, sought to obtain the business of the Fuel Company by making a bid of a lower price than plaintiff was receiving, to Mr. McCaull, the President of the Fuel Company; that plaintiff was unwilling to meet this price; that the owners of the mines were desirous of seeking a pretext to break their contract so as to take advantage of the price offered by Mr. Spicer; that Mr. Spicer undertook to furnish this pretext and this he did by making

use of the "union" sentiment which prevailed; that he caused certain influential leaders among the miners to circulate the story that plaintiff's powder was a non-union powder, whereas the fact was otherwise; that as a result of these charges a strike among the miners was called against the use of plaintiff's powder, and plaintiff lost this business. There is some evidence that intoxicating liquors were distributed among some of the influential men at this time, to acquire their support to this movement.

By commenting upon these two "incidents" after having withdrawn the entire subject, the jury was left to draw but one conclusion, viz., that the methods used with the miners were proper competitive methods; and that the cash which was admittedly paid to Thrush was a proper exercise of competitive rights.

The jury might readily and properly have inferred from the evidence, that where an *individual* miner objected to the use of plaintiff's powder, he did it wholly for personal reasons. He might prefer DuPont powder for his own uses and no inference would necessarily arise that he was actuated by any outside influence. But the situation would be entirely different when miners left their work and gave their time to creating a feeling of dissatisfaction among their fellows against plaintiff's powder. In such a case, where there was no direct evidence that "cash" had been paid to them, the jury would have the right to infer that "cash" was the inducing motive for their activities. And if cash was paid the proper legal inference would be that such cash was paid by the person or concern who benefited by their activities, namely, the Du Pont Powder Company.

The individual miner might be actuated by blind prejudice merely, as was the case at the Willis Coal Mining Company's Mines at Willisville, Ill., as testified to by Thomas Jeremiah, the mine superintendent, (See Trans., p. 522, fols. 1566-1567) who stated that after he began using plaintiff's powder it proved to be very satisfactory to the miners and that he had had trouble about it with only one man:

> "He noticed there had been a change and he come to me personally, and said the powder wasn't as good as the one we had been using, so I went to the mine committee and told them that he had registered a kick, and I told him to send his powder out and I would send him another keg. The mine committee and myself took the powder that he sent out, poured it into another keg of a different brand, sent it back into the mines and I asked him the following day how the powder was working and he said that it worked fine."

It is impossible to believe that some of the things that the evidence shows were done by the defendants to influence the miners against plaintiff's powder, were done without the distribution of "cash". The jury were at least entitled to draw their *own inferences* from the facts presented.

In *Hale vs. Hatch and North Coal Company,* 204 Fed., 431, it was shown that Hale had a successful and growing coal business; that other coal dealers formed the Coal Dealers Association, and that shortly afterwards Hale found that he could not buy coal and one difficulty after another confronted him until he was forced into bankruptcy. The Court said:

> "We have then a successful and growing

business destroyed. A large number of coal dealers whose interests were hostile to those of Hale. Inability on Hale's part to purchase coal except at ruinous prices.

"In looking for the causes responsible for Hale's ruin, we naturally turn to those persons who were being injured by his success, viz., the local coal dealers of Hartford. * * * Without considering the entire testimony which points to the defendants, or some of them, as parties responsible for the destruction of Hale's business, we think enough has been stated to make it clear that the question was one of fact which should have been submitted to the jury."

The instruction of the Court necessitates a review of all the evidence, and we proceed to do so as follows:

I. General Evidence of Improper Influence Exercised by the Defendants with Miners to Induce Them to Reject Other Brands of Powder.

There is much evidence in the record which shows the *general* influence exercised by the defendants with miners concerning the kind of powder which should be used in the mines where they were working and particularly to reject other brands of powder except duPont or allied brands.

(A) Evidence Concerning Miners' and Operators' Agreements Relating to Powder.

The testimony shows that these agreements between the Coal Operators and Miners first came into existence in the early nineties. (R. S. Waddell, p. 923, fol. 2767.)

They were in existence at the time when the plaintiff was conducting its business; that biennial conventions were held between the operators and the miners; that the miners often exercised their right to select the grade or brand of powder

they desired, and that they made demands and used their influence with the operators from time to time affecting the trade which the plaintiff had for black blasting powder with the various operators (Ibid, pp. 796-803).

(B) PIT COMMITTEES.

The interests of the miners under this agreement are taken care of or represented by a "Pit Committee," sometimes called a "Mine Committee." through whom miners make their demands known and effective. The Pit Committee voices the result of a vote taken by the miners on any topic or if a vote is not taken the Pit Committee decides the matter itself unless there be a protest. In fact, it speaks for the miners in all respects. A request made by the Pit Committee for a certain kind of powder is a request made by the miners themselves. (R. S. Waddell, Trans., p. 799.)

(C) EMPLOYING "HOWLERS."

Mr. R. S. Waddell testified that while he was in the employ of the Hazard and duPont Companies at Wilmington he had knowledge of the employment of "howlers," a term used to designate miners who were engaged to raise a disturbance against some brand of powder which the Operator was using or trying to use. He related a conversation which took place between himself and T. C. duPont with respect to the activities of one P. H. Donnelly, a salesman employed by the Chicago office of the Hazard and duPont Companies. He said:

> "Mr. duPont came to my department and asked me what I could suggest be done with reference to stopping Donnelly from hiring

howlers in coal mines, and explained that he had howlers who were paid to raise trouble if any other than duPont brand came in the mines at Springfield and in Northern Illinois and in Iowa. Mr. duPont said that complaint had been made by our associates of this practice and wanted to know if we could not stop it. I told him that I had no control over the Chicago office, it was not under my care as general sales agent, and he would have to look after that matter himself." (Trans., p. 744.)

The occasion for this concern on Mr. duPont's part was that—

> "The Oriental Powder Mills had a contract that had been authorized and that had been made and enjoyed for a couple of years with the Smoky Hollow Coal Company of Avery, Iowa. Complaint had been made by the Oriental Powder Mills that they were unable to supply powder to a customer with whom they had a contract, the Smoky Hollow Coal Company at Avery, Iowa, because the duPont Company through Mr. Donnelly had howlers in the mines in Smoky Hollow Coal Company and they would raise a disturbance when the Oriental powder went into the mines and they asked us—asked the duPont Company to stop that method. That the Oriental was entitled to the trade, that was conceded and that was what Mr. duPont was trying to stop" (Trans., pp. 744-745.)

This circumstance is important as showing, not only that the duPont Company was familiar with the practices of its employees in hiring "howlers," but it is also important, because this same P. H. Donnelly is still in the employ of that Company, and that during the period of the existence of the plaintiff, he was an active agent and representative of that Company in the Peoria and Spring-

field districts where the trade of the plaintiff naturally came from. The evidence tends to show, if it does not conclusively show, that he was instrumental in influencing the miners to refuse plaintiff's powder in the Clark Coal & Coke Company's mine and in Howarth & Taylor's mines to refuse to use Buckeye Powder. (See discussion infra, pp. 202-207.)

(D) General Conditions in Peoria and Springfield Districts.

Mr. Thomas J. Reynolds was a miner of long experience and wide influence in the Miners' Union; he was employed by the plaintiff as a salesman and demonstrator; he went into the mines where Buckeye powder was being used to see how it worked and to attend to any complaints that might be made; he covered a good deal of the State of Illinois, being occupied most of the time in Peoria and Springfield districts; he acted in this capacity for about ten months when he ceased his relations with the company. (Trans., pp. 361-364.)

He testified that whenever he could get a fair test of Buckeye powder, he found little opposition to it on the part of the miners, but this was very difficult to get in the Peoria and Springfield districts, because of the constant "bowling" of the powder out. (See Trans., pp. 364, 366.)

Mr. Reynolds also testified concerning the results of his efforts to get plaintiff's powder introduced into Dugan Brothers' mines at Pekin, Ill. He says (See Trans:. pp. 367-368):

> "The Dugan Brothers, I think, were running that mine at that time and they said if the miners would take the powder they could do

some business with us; so I took the matter up with the miners and took some powder there for them to try; went down the mine after they shot it and saw that it done nice work; everybody was satisfied with it, and they also reported that to the Local Union, and they agreed to use the powder, provided the company would buy it; the company had given assurance that if it was acceptable to the men, they would. After the men had taken that action, there was somebody went down there and went around with the committee of the miners around the mine, and they had them sign up to continue the use of the powder they were using before."

II. Specific Instances of Influencing Miners against Plaintiff's Powder.

(a) The Clark Coal & Coke Co., Mines Peoria, Ill.

This was an important mine using about 22,000 kegs per year. Mr. Horace Clark was the President of the Company, and was a stockholder of the plaintiff holding $1,000 worth of the stock during the entire period while it was in business (Trans., p. 798).

Mr. Clark gave his testimony and stated that he was not able to use Buckeye Powder at his mines because the miners would not use it. (Trans., p. 445.)

On December 28th, 1908, he wrote a letter to plaintiff in which he said (Trans., p. 446):

> "We only wish it was in our power to use Buckeye Powder exclusively, but as you know our miners positively will not use anything but duPont, and as much as we would like to help out our friends, it seems as if we cannot do it."

Now note how quickly these same miners chang-

ed their attitude with respect to using "anything but Du Pont" powder. Mr. Clark also testified that after the plaintiff sold its plant to Mr. Olin the preference of these miners for Du Pont powder immediately ceased, and he immediately began using the powder manufactured by Mr. Olin at this same plant without opposition from the miners and has continued to use it ever since (Trans., p. 446).

Mr. Waddell testified as follows (Trans., pp. 797-798):

> "I know that the Clark Coal & Coke Company, Mr. Horace Clark, president, who was a stockholder in the Buckeye Powder Company and desired to use Buckeye Powder in his mines. I went in to the mines myself and witnessed the shooting of the powder and the test of the powders in comparison with duPont and Buckeye. I saw the results of the shooting. The miners, independent of the results they obtained, decided they would not use Buckeye Powder."

The reason why the miners at this mine would not use Buckeye Powder is indicated in a Trade Report dated June 30th, 1908. (See Plaintiff's Exhibit 151—not printed.)

This Trade Report was made by Mr. P. H. Donnelly, a salesman of the duPont Powder Company, on the business of the Clark Coal & Coke Company and contains the following significant statement:

> "These people are stockholders in the Buckeye Powder Company but have never been able to influence their miners into using that powder. The miners insisted on duPont. Mr. Jno. Theissen, Gen. Supt., *is a good friend of ours* and the trade is all right."

This is the same Donnelly already referred to as having employed "howlers" for the duPont Company. (See supra, pp. 199-200.)

Mr. Haskell's testimony as follows should be remembered in this connection. As the active official of the duPont Company in charge of sales, he is authorized to speak; and he speaks very *conservatively* to say the least (see Trans., pp. 1730-1731):

> "Q. From time to time when your agents were endeavoring to secure custom or business from various consumers of black blasting powder were they at any time authorized to use any influence with the managers of the coal mines to induce them to recommend your powder to their employers? A. As a rule the only way of getting the trade of a coal company, getting them to purchase powder, was to get the good will of the manager and to get him to use, if he would, his influence, which would lead either to the continuance of the purchase or its adoption, if it was not then being sold.
>
> "Q. Did not that effort sometimes extend to the point of giving the mine manager a commission or making a payment to him in some way upon the powder which his employer would use? A. I have no recollection of any payments of commissions to anyone, although at times *cases of shells were given.*"

(b) Howarth & Taylor Mines, Edwards, Ill.

These mines were located about two miles from the plant of the Buckeye Powder Company. They consumed about 3,000 kegs of powder annually. A considerable amount of Buckeye powder was used from time to time. Finally however, as the testimony shows, serious opposition among the miners sprung up against further use of Buckeye Powder.

Mr. Waddell testified that he met members of the Pit Committee of this mine upon many occasions; that they represented some eighty to one hundred and twenty-five miners; that upon a certain occasion Wm. Kingbush, one of the members of the Pit Committee made a proposition to him with reference to the use of Buckeye Powder in these mines. Witness was not permitted to state what this proposition was but he was allowed to say that about the time this conversation occurred, Howarth & Taylor ceased their purchases of plaintiff's powder. (See Trans., pp. 800-802.)

By reference to Plaintiff's Exhibit 1163—the same being copies of two Trade Reports made to the duPont Company and called "Government Exhibit 455," and found at pages 2885-2888 of Plaintiff's Identification P-13 (not printed in the Transcript but in a separate printed volume)—it may be inferred what the proposition to Mr. Waddell, was and how it came to be made. One of these reports is made by a salesman and is marked as received by the Du Pont Company at its offices in Wilmington on July 23, 1904, and states that the firm of Howarth & Taylor are using Buckeye powder "because of a better price and also because *the miners wanted it.* This report was sent in to the Chicago office and *six days later* (on July 29, 1904), a report from that office on Howarth & Taylor's Mines was received at the Wilmington office of the Du Pont Company stating as follows (See Ibid, p. 2886):

> "Understand they had a L. & R. contract, but miners objected to using the powder and *demanded* Buckeye Powder. Mr. Taylor stated that he was buying Buckeye Powder for much less than we had offered him. Mr. Taylor personally favors duPont Powder, but will buy

what miners decide on using. *If the miners could be induced to demand duPont* we might be able to secure a contract with Mr. Taylor, provided the price was anywhere near what he was paying for Buckeye."

That the suggestion here made had the desired effect is shown by the testimony of Daniel Taylor, one of the members of the firm of Howarth & Taylor, and his wife, Olive Taylor, who acted as bookkeeper for the firm.

Both were called by the defendants for the purpose of showing that the reason they ceased to purchase powder of plaintiff was, that upon a test of the two powders Buckeye Powder failed to produce as good results as duPont, and therefore that the miners *demanded* duPont powder. But from their testimony it appears that this particular "test" was held immediately after the above Trade Report was sent in by the Chicago office stating that "Mr. Taylor personally favors duPont powder," and suggested that *"if the miners can be induced to demand duPont,* we might be able to secure a contract with Mr. Taylor."

Mr. Taylor testifies that this "test" was made in 1904 and lasted about three months. It was not a regular "test", such as is prescribed by the Agreement between the Miners and Operators, no particular committee was in charge of it. At the end of the time miners complained that they were not satisfied with Buckeye powder, and he thereupon changed to duPont. (Trans., p. 2085.)

On his cross-examination, Mr. Taylor admitted that the only persons he knew or had met relative to powder interests were "those that came from the Du Ponts", viz., Mr. Dooley, Mr. Moffatt, and Mr. Donnelly (p. 2090, fol. 6268); that he

was under contract with the Du Pont Company at this time (fol. 6276); and that the "Pit Committee *came to me and asked me to make a change from Buckeye to Du Pont*" (p. 2094, fol. 6282).

It is apparent from the foregoing that the results of this test were somewhat colored by the *preferences* of Mr. Taylor as the same were indicated in the Trade Report above referred to, and the testimony given by Mr. Taylor and his wife Olive Taylor, as defendants witnesses displays an earnest effort to support these preferences. But whether this be so or not it was for the jury to determine whether the demand made by Wm. Kingbush of the Pit Committee upon Mr. Waddell as testified to by him, had any relation to the action of the Chicago office of the duPont Company in suggesting to its principals that if the miners *could be induced* to make a demand for duPont powder the business of this firm could be secured, and Mr. Taylor's own personal desires thus carried into effect.

The suggested "inducement" was forthcoming the demand was made, and the Du Pont Company "secured a contract with Mr. Taylor"—all just as the salesman had predicted in his report. (See the contract dated Nov. 1, 1904, Plaintiff's Exhibit P-36; Trans., pp. 2559-2561.)

(c) MAPLEWOOD COAL COMPANY'S MINES, CUBA, ILLINOIS.

Messrs. McElwee & Diteweig, the owners of the Maplewood Coal Company's property became stockholders in the Buckeye Powder Company at the time of its organization and continued to be such down to the time when it retired from business; they desired to use Buckeye Powder in their mine. Mr. Waddell testifies "that the Pit Commit-

tee at the Maplewood mines in my presence notified Mr. McIlwee that they would not have Buckeye Powder and demanded duPont." (Trans., pp. 799, 800.)

Mr. McElwee was called as a witness for the defendant and endeavored to show that his inability to get the powder in use at his own mine was because there was something the matter with the grain. He stated that the first powder which was sent to the mine for test was first-class and did good work, but that subsequent orders did not produce as good results. (Trans., pp. 2127, 2128.) But he was compelled to admit that he had this same difficulty with duPont powder and had had to return a carload of it for the same reason. (Trans., p 2138.) This did not, however, cause him to stop using duPont powder nor did it cause the miners to refuse to use it. So that, as an explanation of the reasons why plaintiffs powder was refused it does not satisfy.

He admits, however, that the influence of the miners was very powerful, and the fact that he as a stockholder of the Buckeye Powder Company did not even dare to make a trial of the powder at his own mines *for nearly two years* after the Buckeye plant started, is a strong circumstance going to show that the miners had much to do with it (Trans:. pp. 2135-2136).

His further testimony confirms this view (Trans., p. 2140):

> "We wasn't afraid of breaking our contract with the duPont Powder Company, *but we were afraid of having trouble with our men* and we wanted to work the matter diplomatically, *so we wouldn't have a strike*, because the coal business was a very peculiar thing. You couldn't tell what the miners

were going to do, and in many ways it was a financial loss to us to have a day off. It was a question of producing coal."

It is noticeable also that, as in the case of the Clark Coal & Coke Company and other mines, *after the sale of the Buckeye Plant* to Olin the miners at this mine found no objection to using some other powder than duPont, for this company soon after began using the product of the Western Powder Company's plant—the successor of the Buckeye Plant, and this too in spite of the fact that it had a contract with the duPont Company.

(d) APPLEGATE & LEWIS MINES, HANNA CITY, ILL. —KNOWN AS THE "THRUSH" INCIDENT.

The evidence in the record concerning what transpired at these mines is conclusive upon the subject whether there was any evidence in the record concerning cash paid to miners by the defendants to influence them to refuse to use Buckeye powder. The owners of this property were Messrs. Applegate & Lewis, of Peoria, Ill. The mines were located a short distance from plaintiff's plant. They consumed about 4,000 kegs of blasting powder per year. The owners were under contract with the duPont Company at the time of the plaintiff's advent, but for several reasons desired to make use of plaintiff's powder. (R. E. Lewis, Trans., pp. 628, 629, 632, 633.)

These reasons are stated by Mr. Lewis as follows (Trans., p. 630, 631):

"Q. Did you have any special desire or special reason why you desired to use Buckeye powder? A. Yes, sir. At the Cuba plant we *were getting a great many screenings* and the desire to secure a powder that would re-

duce the percentage of screenings in our coal was the reason for our using the Buckeye powder at that plant; and at the Hanna plant our reasons for using it—well, it was two-fold. In the first place, the duPont powder had to come to us in carload lots while we could get the Buckeye powder in 100 keg lots, and getting 800 kegs, or carload, from the duPont people necessitated our holding about $1,000 worth of explosives on the premises, while the other amounted to very much less than that and we could get deliveries by the wagon load from the Buckeye people at any time we needed it and it was always fresh. Also, at the Hanna plant, another reason for our wanting to use Buckeye powder was because we thought the *duPont powder was shattering our roof more than was necessary.*"

Mr. Robert Morton, superintendent of this mine, also testifies to the same effect. (Trans., pp. 638-639.)

Mr. Lewis also testified that in order to determine whether plaintiff's powder would overcome the difficulty of screenings, he caused some tests to be made of it. Some of these tests were made by giving it out to practical men and getting their report on the results. (Ibid, p. 630.)

"Q. State what was the result of such efforts as you made? A. We made an attempt to use it at our Cuba plant first and we failed to get it in use.

"Q. Why did you fail? A. Well, that is a pretty hard question to answer. It seemed to be a prejudice against the powder.

"Q. What was the nature of that prejudice so far as you could discover? A. Well, I don't know that I could state the exact prejudices. The fact of the matter was this. We attempted to get it started and did use it in some places with good results and at other

places the results were reported adverse, and, *so far as I could see, there was no good reason for the adverse opinion.*" (Ibid, pp. 629, 630).

In order to determine the merits of the powder finally and authoritatively he decided to have a *formal* test, in accordance with the regulations established by the contract between the Miners' Union and the coal operators.

Mr. Robert Morton, the Superintendent, under whose direction this test was conducted, testified as follows (Trans., pp. 640-641):

"We agreed to make a test of a keg of Buckeye powder and a keg of duPont powder, and it was understood if that test was not conclusive we would go on with several kegs until we did reach a conclusion. So I selected two men from among the miners and the Pit Committee, representing the miners, selected two others, and together with the Pit Committee we entered the mine and selected two places adjoining one another—what is called rooms, where we would try the powders—they were to try the duPont powder in one room and we were to try the Buckeye powder in the other, and, to start with I took personal charge of the placing of the shots of the Buckeye powder, because I was representing the company's side and naturally I wanted to see the powder given a fair test; so for two or three days I made it my business to go in there every day, probably two or three times a day, and instruct the two men—Parry was the man, who was really in charge of the work and was doing the work, while another man, named Kepper, was helping him. I instructed them in the placing of the shots, the angle the holes should be drilled at, and the depth of the holes and the amount of powder that should be given to each shot. We proceeded along very nicely for, I think, about

four or five days, when one day I went in there, as usual, and having a natural inclination to know what the other boys were doing in the adjoining room, I had been in the habit of going in there every day where they were using the duPont powder, and this day, when I went into their place, *I discovered they were undermining the coal;* they had two shots undermined from 18 inches to 2 feet deep, clear along the length of the shots; I said, 'Now, if you boys are so anxious to show that duPont powder can produce more coal than the Buckeye that you are going to mine and wedge this coal, we will quit right now', and I stopped the test right there."

The advantage of undermining is shown by the fact that in that same mine where undermining by machines has been done they have produced about 125 tons of coal to a keg of powder, whereas when shooting "off the solid" they have been able to produce only 18 tons of coal with a keg of duPont powder, and 22 or 23 tons of coal per keg of Buckeye powder. (See Trans., p. 643.)

It is not possible to believe that these miners would have been enough interested in the triumph of Du Pont powder at these tests, to perform the extra work necessary to be performed in *undercutting* the coal, and in committing a fraud on the other miners at the same time, unless they were paid to do so by the interested party.

Mr. Morton further testified (Trans., p. 652):

"Q. What action did they take after the test had been commenced and stopped? A. The thing went along, as I have stated, we continuing to use both the Buckeye and duPont powders, for I think a month or two, *but a great deal of agitation kept up against the Buckeye powder* until it resulted in the calling of the officials there; by that I mean they called John Walker and Mr. Spenney and I

think, Mr. Edwards, who was at that time Board Member from this District, and after a discussion of the case the whole affair, *they demanded that we discontinue the use of Buckeye powder on behalf of the miners,* and Mr. Lewis had gotten so sick and tired of the whole controversy, one way and the other, and I had myself become fully disgusted with the whole business, and I advised Mr. Lewis to drop the whole thing, and let them use any kind of powder they pleased, that if they did not want any more Buckeye powder to go down in the mine to let it go by the board; *there was such an agitation and uproar every a man had a bad shot who was using Buckeye powder,* and if the shot did not work exactly as it ought to, it was the fault of the Buckeye powder; if it blew the coal all out the damned powder was too strong; if it left it stand the damned powder was not strong enough, and if it happened to break the slate the damned powder went into the roof."

And again (Trans., pp. 653-654):

"Q. What would have been the result of a disobedience of that order in the natural course of things? A. If the company had insisted upon the use of Buckeye powder, the mines would have been thrown idle, because the miners *would have refused to work in it.*

"Q. *Do you mean by that, a strike?* A. *Yes, sir.*"

The testimony of Mr. Morton that the quality of Buckeye Powder in comparison with Du Pont was not the reason for the complaints made by the miners is well supported by the testimony of four practical miners who used both brands of powder in the Applegate & Lewis mines, all of whom testified that they got from three to six tons of coal per keg more out of a keg of Buckeye Powder than they did from a keg of Du Pont powder, under the same general conditions.

See testimony of Seth Whites, Trans., p. 1587.

See testimony of David S. Thrush, Trans., p. 1583.

See testimony of David Harris, Trans., pp. 1577, 1578.

See testimony of Charles A. Parry, p. 1569.

Even the defendants' own witness, Alec Thrush, testified that he got good results from Buckeye powder. (Trans., p. 1876, fol. 5626.)

Wm. J. Thrush, who lives at Hanna City Illinois, testified that he had been a coal miner for about 43 years, and was employed at the mines of Applegate & Lewis. That he was an influential miner is indicated by the fact that he was related to about one-fifth of the miners who were engaged in that mine; he was also a member of the Miners' Union, and during 1907, 1908 and 1909 he was a member of the Pit Committee of the Local Union (Trans., pp. 681-682).

Mr. Thrush was selected to represent the Du Pont Powder Company in the test which had been arranged to be held between the Du Pont powder and the Buckeye powder as above referred to in the testimony of Mr. Lewis and Mr. Morton. He acted as one of the judges at that test, having been selected by Samuel Edwards, the sub-district President of the Miners' Union (Trans., p. 682), and was also a member of the "Pit Committee" at that time (Trans., p. 683).

While thus occupying a position of trust, and having a responsibility to the miners to see that their interests were safeguarded, in the selection of the best powder available, Mr. Thrush was at

the same time *in the employ* of Dooley Brothers, the agents of the Du Pont Company at Peoria, and through whom this mine was being furnished with Du Pont Powder.

The agreement was that Mr. Thrush was to receive five cents a keg on all Du Pont powder that was delivered at the shafts of these mines (Trans., p. 695).

He tells the story of his relations to Dooley Brothers, as follows (Trans., pp. 683-684):

> "Q. Do you know who furnished the Du Pont powder that was furnished to you at that time for use in that test? A. Yes.
>
> "Q. Who was it? A. It was an agent of the Dooleys.
>
> "Q. And where are the Dooleys located? A. In Peoria.
>
> "Q. Do you have any personal acquaintance with members of that firm? A. Yes, sir.
>
> "Q. Do you know both of the members? A. Yes.
>
> "Q. How long have you known them? A. About 30 years.
>
> "Q. Do you know any person who was acting for or representing the Dooley Brothers at that time? A. I was representing them for one.
>
> "Q. You say you were representing Dooley Brothers; in what capacity were you representing them? A. As a sub-agent.
>
> "Q. At what point? A. At Hanna City.
>
> "Q. What were your duties as sub-agent at Hanna City for the Dooleys? A. It was to sell their powder as much as possible.
>
> "Q. By whom were you employed to represent the Dooley Brothers? A. I was employed by Mr. Moffatt.
>
> "Q. What are his initials, if you know? A. Edward."

Mr. Moffatt himself was called as a witness and

testified that he had been in the employ of Dooley Brothers as a salesman of powder, dynamite and miners' supplies since April 1, 1898 (Trans., p. 656).

He was a practical miner and was formerly a member of the Miners' Union at Bernardsville, Ill., the membership of which union was very large and gave him a wide acquaintance among the miners in that district (*Ibid.*).

Among the mines embraced in this union was one of considerable importance owned by Sholl Bros.

Lester D. King, a demonstrator and salesman for Buckeye powder, testified that he attended a meeting of the miners employed in Sholl Bros.' mine to urge the merits of Buckeye powder. Mr. Moffatt appeared at the same meeting representing the Du Pont powder direct, and made an address to the miners in which he told them that the owners of this mine had a contract with the Du Pont Company, and he did not see how a change of powder could be obtained, at least until this contract had expired. (See Trans., pp. 438-439.)

The Relation of Dooley Bros. to Defendants.

That Thrush did make the arrangement with Mr. Moffatt which he testifies to and that he did perform the services at the mine of Applegate & Lewis and did go to the office of Dooley Brothers and receive money at the hands of Moffatt, is conclusively established by the evidence; but it is claimed that neither Mr. Moffatt nor Dooley Brothers had any connection with the defendants and that whatever they did in this matter was without the authority of that company. (See Trans., p. 695.)

This necessitates an examination into the relations sustained by Dooley Brothers to the Du Pont Company, it being admitted that Moffatt is an employee of that firm.

Plaintiff contends that Dooley Brothers were the agents of the defendants, through whom it conducted the greater part, if not all, of its business in black blasting powder in the Peoria district.

The record is full of evidence which conclusively establishes this contention, and, so far as we are aware, there is nothing to controvert it. Nevertheless, the defendants repeatedly contended during the progress of the trial, that Dooley Brothers were not agents but merely customers of the Du Pont Company, buying and selling explosives on their own account, and that this view finally impressed itself upon the Court is shown by the rulings during the trial and by that part of the charge which we are now discussing.

There were three kinds of agents recognized in the Powder trade (see R. S. Waddell, Trans., p. 830)—

> "There was the salaried agent, who received a salary, usually a general agent in charge of an office, and then there was a commission agent who received a percentage on his sales, usually ten per cent. or on carloads five per cent., and then there was what we knew as the net price agent, to whom we made a net price, allowing him to make his own profit above that net price. Also an agent to whom a selling price was given and a commission, or an allowance for his services below that general selling price."

James B. Dooley, one of the partners, testified that during the years 1903 to 1909, his firm

handled Du Pont powder exclusively; previous to that time they handled the Phenix powder (Trans., p. 607). The Phenix was in reality a Du Pont powder, for it was manufactured by the Phenix Powder Company, which was owned by the Du Pont Company.

He also testified that he had *exclusive use of the magazine owned by the Du Pont Company* (Ibid., p. 609); and before that magazine was built they used the magazine owned by the Phenix Powder Company; that they never paid any rent for it (Ibld., p. 610).

That Dooley Brothers held themselves out as agents of the Du Pont Company, *with the full knowledge and consent of that company,* is shown by the testimony of customers of the Du Pont Company, who were under contract with that company.

See testimony of Daniel Taylor, of Howarth & Taylor (Trans., pp. 2090-2091).

Also of W. E. Foley (Trans., p. 2350).

Also of R. E. Lewis, of Applegate & Lewis (Trans., p. 632, fol. 1895).

Also of Horace Clark, President of the Clark Coal & Coke Co. (Trans., pp. 444-445; also p. 447, fol. 1339).

A series of contracts entered into between various consumers of black blasting powder, in the Peoria district, are found in the record as exhibits which were produced by the officials of the Du Pont Powder Company, under subpoena duces tecum, which unmistakably show that Dooley Brothers were the agents of that company.

Plaintiff's Exhibit 901 (see Trans., p. 2614) is a contract made on August 1, 1906, between the E.

I. Du Pont Company, and A. Reents & Brother, of Kramm Station, Ill. Signed "E. I. Du Pont Company, *by Dooley Bros., Agts.*"

Plaintiff's Exhibit 732 (see Trans., p. 2590) is a contract made on August 1, 1906, between E. I. Du Pont Company and Clark Coal & Coke Company of Peoria, Ill. Signed "E. I. Du Pont Company, *by Dooley Bros., Agents.*"

The contract with this very firm of Applegate & Lewis shows that Dooley Bros. were acting as the agents of the Du Pont Company in making the contract. (See Plaintiff's Exhibit 762; Trans., p. 2598.) The contract is dated Nov. 30, 1907. It is made between Du Pont Co. and Dooley Bros. for blasting powder "for use of Applegate & Lewis Coal Co." Attached to same is a letter from the Du Pont Company to its agent at Chicago, which says: *"Our* contract with the Applegate & Lewis Coal Co., Peoria, will expire Nov. 30 next. Please advise them that it is not our desire to continue this contract," etc. (See p. 2600, fol. 7800.) There was no contract between the duPont Company dated Nov. 30, 1907, except the one made through Dooley Bros.

Plaintiff's Exhibit 740 (see Trans., p. 2591) the contract of the Clark Coal & Coke Company is renewed *through* Dooley Brothers, instead of directly, as before. The contract is made between the E. I. Du Pont de Nemours Powder Company, as party of the first part, and Dooley Brothers as party of the second part, who agree to purchase "all the black blasting powder required by the party of the second part, during the period of this contract, *for use of Clark Coal & Coke Company,* Peoria, Ill." Attached to the contract is a letter from the Director of the Sales of the Du Pont

Company to its Secretary, reading as follows (see Trans., p. 2593, fol. 7777):

> "Please note that due notice has been given of our desire to discontinue *our* self-renewing contract No. 762 with the Clark Coal & Coke Company, Peoria, Ills., running from January 1, 1908, to January 1, 1909."

The same situation applies to the business of Howarth & Taylor of Edwards, Illinois. See contract made Nov. 25, 1907 (Exhibit 741, p. 2593). Two letters are attached thereto—one to the Secretary of the Du Pont Company and the other to its Chicago manager, in whose district Peoria lies —notifying them of the discontinuance of *"our* contract with Howarth & Taylor." (See Trans., p. 2595, fol. 7785.)

The same situation applies to the business of Sholl Brothers, Peoria, Ills. See contract made Nov. 27, 1907 (Exhibit 745, Trans., p. 2596). See letter notifying discontinuance of *"our* contract with Sholl Bros." (Trans., p. 2598). See also contract made Nov. 27, 1908 (Exhibit 1247-AA, Trans., p. 2724).

See the long list of contracts summarized and partly set out at the Transcript, pp. 2601-2609, all of which are similar in form to the Applegate & Lewis contract, which precedes the list, as Exhibit 762. See also another large list at Transcript, pp. 2728-2731. These contracts are all made *between* E. I. du Pont de Nemours Powder Company as the first party, and Dooley Bros. as the second party; but each provides that it is for supplies to be used by a third party. Then there follows a letter which describes the contract as *"our* contract with" the *third* party—not *our* contract with Dooley Bros. for supplies to a third party. Most of these third parties were at one time under con-

tract *direct* to the Du Pont Company and it is beyond doubt that the change is a change of *form* only.

That Dooley Brothers were acting purely as agents, and solely for the benefit of the Du Pont Company in *making* these contracts, is beyond all doubt, and as soon as executed they were turned over to their principal.

If it is possible to assume that Dooley Brothers were not previously authorized by the Du Pont Company to employ Thrush it is unquestioned that it profited by their acts and, therefore, being beneficiaries of these acts, it should have been held to be bound by them.

In *Cliquot's Champagne,* 3 Wall., 114, 140, it was said:

> "Whatever is done by an agent, in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved as well in a criminal as in a civil case, in all respects, as if the principal were the actor or the speaker."

In *Stockwell vs. United States,* 13 Wall, 531, 548, it is said:

> "The tortious act of the agent is the act of his principals, if done in the course of his agency, though not directly authorized. And this is emphatically true when the principals, as in this case, have *received and appropriated the benefit of the act.*"

Employment of Miners by Plaintiff at Applegate & Lewis Mines—Assignment of Error 13.

Some effort was made by the defendants to show that plaintiff also employed miners to im-

properly influence their fellow-workmen to reject Du Pont powder.

And yet, notwithstanding the absolute absence of any evidence to justify the slightest inference to this effect, and the manifest impropriety of any such instruction on the part of the Court, we find the Court incorporating this very suggestion in its charge to the jury, as follows (see Trans., p. 2465, fol. 7394):

> "*While this test was going on* each of the powders had a paid representative among the working miners, one acting in the interest of the plaintiff's powder and the other in the interest of the defendant's Alec Thrush representing the plaintiff's powder, received $1.00 a day for a period of time. The period is in dispute between Mr. Thrush and Mr. Waddell. William J. Thrush, a relative of Alec Thrush (I understand he was a relative, although he may have been a distant one), working in the interest of the Du Pont powder, received five cents for each keg of such powder that was used there. Both of these Thrushes were members of the Pit Committee and therefore in an influential position."

That portion of this charge which says that:

> "While this test was going on each of the powders had a paid representative among the working miners, one acting in the interest of plaintiff's powder, and the other in the interest of the defendants" is assigned as Error No. 13. (See Trans., p. 3204, fol. 9612.)

There is no evidence whatever that Alec Thrush was acting as a representative or in the interest of plaintiff's powder at the time of this test. On the other hand, he was called as a witness for the defendants, and testified positively that he *was*

not there at that time (see Trans., p. 1870, folio 5610):

"Q. In this case, as this test progressed, do you remember that Mr. Morton made some objection to the way the Du Pont powder was used there? A. I understood he did. *I was not there.*

"Q. You had charge of the immediate test there in the mine, what committee? A. I don't know which committee; I don't know who the committee was that was put on that test."

Furthermore, his testimony shows that the inference carried by the Court's charge that he was employed for some improper purpose, that is, to secure the installation of plaintiff's powder by unfair means—such as undercutting the coal—was clearly unwarranted. On his direct examination the following occurred (see Trans., pp. 1865-1866):

"Q. What did Mr. Waddell say to you? A. Well, he had some samples of powder along with him showing them there and wanted to introduce them and get his powder established in the mines, if possible, and wanted somebody to kind of look after the matter in a way, so he would have a fair show with the other powders.

"Q. Did he propose any method of doing it, and, if so, what? A. He wanted me to take the powder and use it in a practical way to see if we could not produce more good lump coal with his powder than what we could with the Du Pont powder."

And again, on cross examination, he testified that he followed up the results obtained by the miners with the use of Buckeye powder, and many of them did not get as good results as they got with Du Pont (see Trans., p. 1876):

"Q. Was not that the only part of your

business for the purpose of introducing the powder in that way, explaining how it was to be shot, and so forth? A. Yes, sir.

"Q. What results did you yourself obtain—good results? A. Yes, I obtained good results from the powder I shot.

Q. And so reported to Mr. Waddell? A. Yes.

"Q. Do you know of any reason why the others should not have obtained as good results as you did? A. I do not think they took the pains to get their shots in proper condition before it was used, with that or with any other powder."

Mr. Waddell testified (see Trans., p. 2420, fol. 7259):

"I employed Mr. Thrush at $1.00 a day to go about the mines of Applegate & Lewis after his day's work was done, to assist other men, other miners, in the proper use of Buckeye powder. He was a very successful miner with that powder. I agreed to pay him a dollar a day. He was employed for thirty days. I paid him $30. for that work."

It is proper to say that the effort to show that plaintiff had employed miners for an improper purpose signally failed. Alec Thrush, like the other miners employed by Plaintiff, at different times was employed solely to *demonstrate the shooting qualities* of Buckeye powder; that is, to show the miners how to handle it, in order to get the best results. There is not a word of evidence in the entire record which even *tends* to show that anyone was ever employed to decry the qualities of other brands of powder, or to "howl" against them, or to conduct *unfair tests* (such as *undercutting* the coal to increase the effectiveness of the powder), or to stir up strikes against its use (as was done at the Great Northern Fuel Company's mines).

(e) Great Northern Fuel Company Mines at Novinger, Mo.—Known as the "Spicer Incident."

On the 25th day of May, 1905, the Great Northern Fuel Company made a contract with the plaintiff, for supplying power to its mines at Novinger, Missouri. (See Plaintiff's Exhibit 1314, Trans., p. 2694.)

A total of 1,000 kegs of powder was delivered by plaintiff under that contract. (See Plaintiff's Exhibit 1936, Trans., p. 2906.)

The miners were well pleased with it and the results obtained were satisfactory. On a comparative check of tonnage more coal was produced with Buckeye powder than with Du Pont powder (Testimony of Stephens, Trans., p. 461).

It had reduced the slack in the coal at one of the mines about 15 per cent. (Plaintiff's Exhibit P-57, Trans., p. 2375, fol. 7125.)

The powder manufactured at the mills of plaintiff was made by workmen who were members of the United Powder Worker's Association and hence was known as a "union" powder. (See Plaintiff's Exhibit P-1112, Trans., p. 2630.)

Mr. McCaull testified that sometime after he made the contract with plaintiff, he found that the Du Pont Company was selling its powder to other operators in the same field at ten cents a keg less than his company was paying to the plaintiff; and that he had tried to get plaintiff to meet this price without success; that he decided that he would try to get away from his contract so that he could get the benefit of the lower price; that he instructed the mine superintendent, Mr. Grant, to get hold of the Du Pont people; that afterwards

he (McCaull) had an interview in Kansas City with Mr. Spicer, a representative of the Du Pont Powder Company, who made him an offer of better prices than he was paying the plaintiff, and he told Mr. Spicer that if he knew of any way he could get the miners to ask for Du Pont powder, he would be glad to sign a contract with the Du Pont Company; that Spicer replied that he would go to Novinger and see what could be done; that—

> "When we were discussing how to get the miners to ask for a change of powder, so that we could break our contract, our Buckeye contract, the question came up about the *union powder*, and I stated to Mr. Spicer that I understood Buckeye was a union and Du Pont was a non-union powder and *it would be up to him to get hold of the boys at the mine and show them that the Buckeye had since become a non-union powder, and that Du Pont was operating some union mills, and he said that could be easily fixed*, and he would explain it to the boys that Du Pont could furnish them with union made powder, and I told him if he couldn't furnish union made powder he might persuade the Pit Committee that the Tinners' Union label on the keg might be sufficient, and he said he would see what he could do" (Trans., pp. 493-494).

That shortly afterwards he received advices that the miners had made a peremptory demand on the company to supply them with Du Pont powder, and that they had called a strike until their demand was complied with; that they even refused to use up what Buckeye powder was on hand and that he had to get rid of it by jobbing it out to small users. "I didn't expect the miners to call a strike; I expected them to ask us to

change, and it took me by surprise when they struck, and no Du Pont powder in sight, and I couldn't get it under a week, and that they would not use up the other powder" (Trans., p. 494, fol. 1482).

Mr. McCaull, not being in Novinger, was not able to relate of his own knowledge what happened to bring about the change; but this is related by four witnesses, two of whom were mine foremen at the company's mines, one a member of the Pit Committee and another the secretary of the local union at Novinger.

Mr. Stephens, one of the mine foreman, best describes what was done and the occasion of this strike in his own words (see Trans., p. 449-452):

> "Q. State according to the best of your recollection *what was the occasion of this strike* to which you have referred? A. Well, just previous to the time we had this strike our manager called me on the 'phone and said—
>
> "Q. Just state what you yourself know and omit any reference to what the general manager said to you. A. Well, the district foreman of the Mine Works and another gentleman came down there—
>
> "Q. Who was the district foreman? A. Mr. Phillips.
>
> "Q. Who was the other gentleman? A. I can't recall his name; *he was a representative of the Du Pont Powder Company, introduced to me as such.*
>
> "Q. State what occurred at that time? A. Well, *Mr. Spicer, or Spencer,* and a man by the name of Phillips, who was a sub-district president for the Mine Workers in that district, they came down there and I introduced them to Mr. Hayes and Mr. Jackson and Mr. Bisby, was the Pit Committee at that time

and they were talking about the Buckeye Powder.

"Q. This conversation occurred in your presence? A. Yes, sir.

"Q. Can you relate what you heard at that time? A. Well, Mr. Spencer and Mr. Phillips, I knew they were coming, of course, and I took them down and introduced them to the committee, and I was of the understanding that it was relative to the use of powder; that was my understanding of it, that it was regarding the fact that we were using Buckeye powder and we were going to use Du Pont powder.

"Q. You introduced these men to the committee for what purpose? A. For them to instruct the committee as to the fact that *this was a non-union powder* and that the Du Pont's was; and that we were willing and anxious for a change.

"Q. How did you learn that the Buckeye powder was a *non*-union powder; where did you get that information? A. That was the information I got from *Mr. Spicer and Mr. Phillips;* I got that information through the conversation we had at the time of the committee—

"Q. What occurred after that? A. I left the committee and went down about my work and the next thing I knew I saw a notice—a written notice at the top of the mine that there would be a meeting called at Novinger that evening to discuss non-union powder at Union Hall.

"Q. Do you recall whose name was signed to it? A. Yes.

"Q. Whose? A. Joseph Rutherford.

"Q. Who is he? A. The secretary for the local union and check weighman for Mine 31.

"Q. After that was posted, what occurred? A. I know that all the miners went to Novinger and the next morning they didn't come to work.

"Q. What do you mean? A. *They went to the local meeting and the next day we had a strike on.*

"Q. How did you receive that information? A. As foreman of the mines I had my engineer and my day man blow the whistles and get up the steam and the following A. M. none of the miners reported, and I went to the boarding house adjacent to the mine and Mr. Hayes informed me, as committee of the miners, that they had ordered a strike, and that there would be no more work done until we had Du Pont powder at that mine.

"Q. At that time did you have any Buckeye powder on hand? A. Yes, sir, about 250 kegs.

"Q. Did you succeed in using any of that powder afterwards? A. Not at that mine; I sold the powder to a small individual company that was digging coal for farmer trade located close to where 31 was.

"Q. How long did that strike continue? A. I am not positive as to the exact time, but the best I can remember about a week or ten days.

"Q. It lasted a week or ten days? A. Yes.

"Q. How did it terminate? A. Well, I was instructed to get Du Pont powder and I got a team and went up to No. 2 Rombauer.

"Q. What did you do with the powder you got of Mr. Rombauer? A. Sold it to the miners.

"Q. From whom did you afterwards obtain your powder? A. I don't know; it was sent down there in a car and I unloaded it; I don't know anything about it.

"Q. Did you continue to use Du Pont powder from that time on? A. Yes.

"Q. Did the miners come back to work and continue to work as soon as you supplied them with Du Pont powder? A. Yes; I think it was about a week until we got Du Pont powder, and then they went back to work; it might have been ten days.

John Kelly, another mine foreman of the same company, testified concerning the part he had in the matter as follows (see Trans., pp. 466-467):

"Q. After you ceased the use of Buckeye powder, what powder did you begin to use? A. We had to use the Du Pont then.

"Q. What was the occasion, if you know, of your ceasing the use of Buckeye powder and beginning the use of Du Pont powder? A. Yes, it was because of a strike in the mine.

"Q. How did that strike occur? A. The strike occurred, that they wouldn't use any more Buckeye powder on account of not *being union made powder.*

"Q. How did that information come to your attention? A. Through the Pit Committee at the mine.

"Q. What was the Pit Committee? What were its particular duties with reference to the mine operators? A. Well, sir, they looked after the interest of their men, of the union miners.

"Q. And what authority did they have to speak for them? A. They had full authority. The Pit Committee has full authorities from the mine workers.

"Q. Do you know anything about any meeting held by the miners in your mine for the purpose of considering the question as to what powder they use? A. Yes, sir.

"Q. State what you know about that. A. Well, sir, they had a meeting to that effect; that's what brought up the trouble; they held their meeting in their hall, and they decided they wouldn't use any Buckeye powder on account of being a 'scab' powder; that's all I understood about it.

Mr. Hayes, a miner in the mines of this company, and one of the three members of the Pit Committee, testified that in the fall of 1905 a strike occurred at the mine, which came about by

reason of the powder question; that they were using Buckeye powder just previous to the strike; that he remembered being called upon as a member of the Pit Committee just previous to the strike by some person who talked to him in regard to powder, but he could not recall who the man was, or what was his name, or how he looked (see Trans., pp. 472-474):

"Q. What was it that he called for; what did he say to you? A. I don't remember what the conversation was, only in regard to powder.

"Q. What did he say to you in regard to powder? A. I can't just remember.

"Q. You say he said something to you in regard to powder; state your best recollection. (Objection overruled.) A. To my best recollection, it was something in substance to the effect that the powder we were using was not union made powder, *and the powder he represented was;* that's the best of my recollection.

"Q. Did he ask you to do anything with reference to that question? (Objection overruled.) A. I don't remember; I'll answer it in this way: That our sub-district representative brought it up to us and requested us to take action.

"Q. Who was he? A. John Phillips.

"Q. What did Mr. Phillips say to you about it? A. I don't just remember what he did say.

"Q. Did you take any steps in answer to the request that Mr. Phillips made of you? A. We did.

"Q. What steps did you take? A. *Posted a notice, and had a special meeting, and the consequence was, we had to strike to get the Du Pont powder.*"

On cross examination, this witness testified as

follows, which controverts the instruction of the Court that "there is *no evidence* that intoxicating liquors were used" to influence the miners (See Trans., pp. 475-476):

> "Q. I take it from the way you answered these questions—this being a long time ago, your recollection is rather vague, isn't it? A. Well, yes; in some instances; I don't just recall things like—that is, like I could at an earlier date.
>
> "Q. And it comes to this, doesn't it, that you recollect there was some disturbance between these two powders, and you had a meeting and a strike? A. Yes.
>
> "Q. How many saloons were there around there *where they had this beer?* A. None, now.
>
> "Q. How many were there at that time? A. I don't remember.
>
> "Q. It was more than one? A. Yes.
>
> "Q. This meeting at the saloon wasn't a formal meeting? A. It wasn't at the saloon.
>
> "Q. Where was it? A. About a quarter or half a quarter out of town, about three blocks.
>
> "Q. Was this a formal meeting at that local? A. No, sir.
>
> "Q. Some of the miners gathered there and had a keg or two of beer? A. *The men working for the Great Northern Fuel Company implicated in this.*
>
> "Q. They were not all there? A. I don't suppose so.
>
> "Q. It is not an unusual thing for miners to drink beer? A. Not any more than anybody else."

Joseph F. Rutherford, another miner at this company's mines, and also the recording secretary of the Local Union, testified that he had used Buckeye powder and kept tab on the coal produced with it, and that he was very much in favor of it;

that he was called upon by Mr. Phillips, the sub-vice-president of the Local Union, accompanied by another man; he did not know the man's name, but he identified Mr. Spicer, who was in the room at the time the witness gave his deposition, as being the man with Mr. Phillips.

"Q. What was said to you by Mr. Spicer, *the gentleman whom you have identified,* at that time, with regard to the use of Buckeye powder? A. The main talk I had with Mr. Phillips and Mr. Spicer, to the best of my recollection was *not* in regard to the *quality* of the powder—

"Q. State the conversation as near as you can recall. A. They both represented to me or made me believe—

"MR. BUTTON: (Interrupting) That is objected to as a conclusion:

"Q. State as near as you can what they said? A. (Continuing) That the Buckeye Powder people was not *authorized,* and it wasn't a *union made* powder.

"Q. And what did he say with reference to the *Du Pont* powder, if anything, as to whether it was union or non-union? A. That it *was union* powder; that it was organized or reorganized.

"Q. What, if any, effect did that have upon your subsequent conduct in relation to the use of Buckeye powder? A. Just as much as it would on any other subject; I would be *very favorable to organized labor;* if the results were anywhere near equal.

"Q. Was or was not a meeting held by the miners to consider that question of whether they would use, or continue to use, Buckeye powder, or adopt Du Pont powder? A. Yes, sir" (pp. 479-480).

In order to contradict what these witnesses testified to and to make it appear that the strike was against Du Pont instead of Buckeye powder,

Mr. Spicer, himself, was called as a witness for the defendants. But, instead, the correspondence which he presented, written at the time, confirms plaintiff's witnesses. He produced a letter written by himself in the name of the Du Pont Company at St. Louis to Mr. McCaull at Kansas City, dated August 17, 1905, suggesting that the Du Pont Company would like to figure with him on a contract and he would have their Mr. Spicer call upon him wherever he might suggest (see Defendants' Exhibit A-513, Trans., p. 1887); and he produced a reply to this letter from Mr. McCaull, dated at Kansas City the following day, stating "that owing to action of the Miners' Union, *your powder was boycotted and we were compelled to sign a contract for another brand of powder.* Would be pleased to do business with you at some future time, should the *miners change their mind* and be willing to use Du Pont powder again (see Defendants' Exhibit A-372, p. 1889); he also produced another paper, dated August 21, 1905 (see Defendants' Exhibit A-515, Trans., pp. 1890-1892), in the form of an application written by himself to the Du Pont Company stating that he had had an interview with Mr. McCaull and that—

> "Mr. McCaull stated that recently the miners in their employ made a demand for Buckeye powder because of its having union labels, and rather than bring on a fight with the miners, they consented to this and bought some Buckeye powder and made a contract with them. He would not state the price, *and when we suggested to him that we might have been able to overcome this had he let us know about it,* he referred to matters of the past, particularly when their company was a buy Du Pont powder the Du Pont Company new one, and said at the time they tried to

was not willing to sell them for some reason or other, and for this reason they did not feel like making a fight in favor of Du Pont as against Buckeye and for that reason made no effort to overcome the demand for Buckeye powder. This matter was discussed quite a little and Mr. McCaull stated that if later on the miners changed their minds, which they frequently do, they might be quite willing to try Du Pont powder, but as long as matters remain as they are, they will probably use Buckeye, unless there is *some inducement* for them to change the brand."

It is apparent from the foregoing that Mr. McCaull was referring to a *previous* period, and to some other boycott, for the testimony clearly shows that the boycott and strike of the Buckeye powder was between the 1st and 15th of September, 1905, (see Trans., p. 453, fol. 1358). The contract of the plaintiff with this company is dated May 25, 1905. (See Plaintiff's Exhibit 1314, Trans., p. 2694.) The contract with the defendants is dated November 1, 1905. (See Plaintiff's Exhibit 785, Trans., p. 2609.) This accords with what Mr. McCaull says in his testimony that he ceased using Buckeye powder as the result of this strike about the 15th of October, 1905 (see Trans., p. 489, fol. 1467).

If there was at any time a boycott in *favor* of Buckeye powder it must have been *before* the contract with plaintiff was made—not afterward.

This is also confirmed by Mr. Spicer's further testimony that he again called on Mr. McCaull, *in September, 1905,* at which time Mr. McCaull informed him that he had learned that other users of powder at Novinger were enjoying better prices for Du Pont powder than he was paying under his contract with plaintiff, and wanted to

know if the Du Pont Company could make him the same price (see Trans., p. 1896):

> "Q. What did you tell him? A. I told him we could probably arrange it.
>
> "Q. What else was said? A. Mr. McCaull said that if that was the case he would see what he could do towards switching over to Du Pont powder, and he said he would get some of his company men to make a demand for Du Pont powder, and that he would see me later."

The following *Trade Report* made by John E. Carroll, a salesman on November 14, *1904*, on the business of the Great Northern Fuel Co., also shows that there was a former controversy at this mine, having unionism as its basis, but that at that time the Fuel Company was using Austin powder, not Buckeye.

> "I learned from Mr. Kelly, pit boss at one of the the company's mines, that this company is under contract with the Austin Pdr. Co. until the end of the Miner's Scale, which is about March 1st, 1905. Mr. Kelly told me the men were dissatisfied with Austin because they say it is a non-union powder and are demanding Du Pont. He said the company would furnish Du Pont at once if they could be released from their contract with Austin Company." (See Plaintiff's Exhibit 331—in files, not printed in Transcript.)

Other evidence in the record shows that Mr. Spicer was well acquainted with the methods by which the miners were induced to demand Du Pont powder. That he was experienced in dealing with them himself is virtually admitted by him in the following testimony (Trans., pp. 1900-1901, fols. 5700-5701):

> "Q. Did you ever approach any person or

persons with reference to influencing miners in the mines of persons to whom you were trying to sell powder, to accept your powder in that mine and make a demand for it on the operator? A. I cannot recall at the present time.

"Q. Will you state you did not? A. *I think I will let the answer go as it stands.*"

In view of the above evidence, the following testimony of Mr. Donk, President of the Donk Coal and Coke Company, also furnishes ground for the fair inference that Mr. Spicer was responsible for the opposition to Plaintiff's powder which finally developed at the Donk mines. Plaintiff sold Mr. Donk's Company 17,400 kegs of Buckeye Powder, during a period of about six months—from July, 1904, to January, 1905 (See Plaintiff's Exhibit 1434, Trans. 2933, fols. 8799-8800). Mr. Donk testified (Trans. p. 2355, fols. 7064-7065):

> "In the main it proved satisfactory. I didn't have much trouble with it; and as it went along, I had more grouches and more trouble and more kicks than a little; and then I changed to the Egyptian; and then they had a powder committee over there, and they said Du Pont Powder would suit them better than any other. 'All right, I will see about it,' I said, and we had *Mr. Spicer*, or some representative of the Company, arrange for Du Pont powder."

It should be remembered that the "Egyptian" powder referred to by Mr. Donk was manufactured by the Egyptian Powder Company, which was owned by the Equitable Powder Company, in which the Du Pont Company had 49 per cent. of its stock (see supra, Point II, p. 109).

POINT X.

The Court committed error in refusing to receive evidence concerning the statements made by Plaintiff's customers relative to the receipt by them, from sources other than Plaintiff, of information relating to consignments made to them from Plaintiff's mills; and it also erred in refusing to receive evidence concerning the result of an investigation made by officials of the C. B. & Q. Railway (the initial line of shipment from Plaintiff's mills) relating to the giving out of such information by its employes; and also erred in instructing the jury that one who is already established in business, may lawfully "keep tab" on the business of a new competitor by maintaining a "surveillance" over the conduct of such new competitor.

Plaintiff alleged that the Du Pont Powder Company succeeded in enlisting the services of certain employes of the Chicago, Burlington & Quincy Railway Company to furnish said company with daily telegraphic reports of shipments from its mills, agreeing to pay in consideration therefor one dollar for each telegram and five dollars for each letter carrying such information, and sometimes a stipulated salary; and that in this manner, it received advance information of shipments from the plaintiff's mills, which it made use of to induce the consignees to reject shipments and abandon plaintiff. (See Trans., pp. 19-21.)

The consideration of this question involves three assignments of error, namely, Nos. 14, 15, 16.

Error No. 14 (See Trans., page 3205, folio 9613) relates to the action of the Court—

> "In refusing to permit R. S. Waddell, a witness for the plaintiff, while on direct examination, to state what it was that caused him, as president of the plaintiff, to make an investigation for the purpose of ascertaining how it was that advices were received by him from persons to whom consignments of black blasting powder had been shipped from the shipment office of the Buckeye Powder Company —giving the definite car number of the car in which shipment was made and all the details of the shipment—before notice of that shipment had been received at the business office of that company."

And Error No. 15 (Ibid, folio 9614) relates to similar action by the Court—

> "In refusing to permit John G. Miller, a witness for the plaintiff, while on direct examination, to answer the following question —he having already been permitted to testify that he called the attention of the Burlington Railway Company officials to the situation relative to information concerning the shipments made by Buckeye Powder Company to its customers coming to him from sources other than the Buckeye Powder Company, and that said officials made an investigation:
> "Q. Now, do you know what the result of that investigation was."

The first ruling here complained of was preceded by the testimony of Mr. Waddell that when shipments were made to customers, they were billed out from the plaintiff's mills at Edwards, Ill., and bills of lading and advices of shipment were mailed to the Company's business office in Peoria, on the same day, where they arrived the following day; that on numerous occasions, before

the consignees could possibly have received any information from the plaintiff concerning these shipments, and even before the bills of lading and advices had been received at the plaintiff's business office in Peoria, he (Mr. Waddell) had received advices from the consignees themselves giving the definite car number of the consignment made to them on the previous day, with all the details. (Trans., page 808, folio 2424.)

This fact caused him to make an investigation of the source of the leak. He suspected the Railway employes at Edwards and made complaint to Harry Paige, the general agent of the C. B. & Q. Ry. Company at Peoria.

The plaintiff then offered to show that Mr. Waddell caused a certain investigation to be made by the Railway officials of the C. B. & Q. Ry., and to show what he ascertained from these Railway officials as to the means used through the Railway Company and its employes, for giving out this information, which offer was refused; and this action of the Court is the first error now under consideration. The next error arose as follows:

Among the persons named by Mr. Waddell as one of the consignees from whom he had received advices in the manner indicated, was Mr. John G. Miller of Chicago, (Trans., page 805, folio 2415). Subsequently, Mr. Miller was himself called as a witness for plaintiff and testified that he was a stockholder of the Buckeye Powder Company, and handled its product during its existence, on a net price basis; that during this time he received information concerning the business in which he was interested from sources other than the Buckeye Powder Company.

He further testified as follows (See Trans., p. 322, folio 966):

"Q. Did you at any time make any investigation or institute any investigation as to the reasons for information coming to you in this manner that you have indicated? (Objection overruled.) A. Yes, sir.

"Q. Now, state what that investigation was. A. I saw the Burlington officials and called their attention to the situation and they made an investigation.

"Q. Now, do you know what the result of that investigation was?"

Upon objection, the Court refused to allow Mr. Miller to answer the last question, which constitutes the second error under consideration, (No. 15).

After Mr. Waddell complained to Mr. Paige, as above stated, he (Paige) was approached by one W. H. H. Piatt who was *an employee of the Du Pont Company at that time,* and offers were made by Piatt to employ Paige to obtain this information. Mr. Paige himself was a witness, and his testimony relating to this matter may be summarized as follows:

He testified that *all* shipments from plaintiff's mills originated on the line of the C. B. & Q. Railway at Edwards Station, Illinois, as this was the only line having access to the mills; that he had an interview with Piatt at a hotel in Peoria, in which Piatt said that he was desirous of obtaining information of the destination of the shipments, especially carload shipments, from plaintiff's mills, and that he understood Paige's line handled their rates, and that the copies of billing for all their shipments came to his office, and that if he was willing to furnish Piatt with the information, Piatt would pay him $5.00 a letter for one letter a week. (See Trans., pp. 346-347.)

Mr. Paige testified further as follows (Trans., pp. 347-348):

"I told Piatt that was a little new for me, that I hadn't been selling out on a proposition; that I was human, and probably had a price, but I felt quite sure that it wasn't $30 a month; but that I would take the matter under consideration and let him know a little later in the day. I then telephoned to Mr. Waddell, that I wanted him to meet me; he did, and I laid the proposition before him, more as an evidence of good faith with him, as he *had previously complained that somebody was giving out information to his competitors as to his business,* and I took that means of assuring him that, at least our office, or the people that he was dealing with directly, were trying to be honest and square with him, and that we would not lend ourselves to anything of that kind without his knowledge and consent. He advised that I pass the matter over and have nothing to do with it. I then called on Mr. Piatt and told him I couldn't do it."

At this second conversation of Piatt with Paige, Mr. Waddell was present by arrangement with Paige (unknown to Piatt) and saw Piatt and heard the conversation between them, and subsequently recognized him as the same man who called upon him a few days later. (R. S. Waddell, Trans., p. 771, folio 2313.)

The evidence, however, shows that Piatt's efforts to employ Paige were only a part of his activities in this direction; that he represented one W. B. Dwinnelle, of the Advisory Counsel of the head office of the Du Pont Company, at Wilmington, Delaware; that three or four days after Piatt's efforts to employ Paige, he called at the office of plaintiff in Peoria, where the following conversation took place between himself and Mr. Waddell, its President (see Test., R. S. Waddell, Trans., pp. 770-771):

"Mr. Piatt said that Mr. Du Pont, knowing that he was going to call at Peoria, asked him to call on me and presented Mr. Du Pont's regards. I asked Mr. Piatt when he came to the city. He told me that morning. I asked him if he had ever been in the city before. No, he had never been there. He said that it was not the custom of the Du Pont people to allow the employees in their offices to visit their mills and said that he would like very much to visit a powder mill and asked if he could go to my mills that day. I did not then reply to the question. I asked him if he had not been to my mills before? He told me he had not, and I then told him that I knew that he had been in the city the preceding week, and that he had had a conference with Harry Paige and tried to hire him at $50 a month and $5 for each letter and a dollar for each telegram, to betray my business in shipments on the C. B. & Q. Railroad. *I also knew* that he had hired a man by the name of O. D. Head to do some spying and make some drawings of the machinery in my mills. *I also knew* that he had attempted to hire Fred Nagel, agent of the C. B. & Q. Railroad at Edwards, who did the billing of the powder shipments from the Buckeye Mills. *He admitted all those things.*

"Mr. McCarter: We object to that.

"The Court: Yes, what did he say?

"Q. Say what he said when he admitted that. A. *He said he knew that he had done so.* And I told him then that in reply to his request to go to my mills, to say to Mr. Du Pont that I wanted to send a message to Mr. Du Pont by him, and to say to Mr. Du Pont that my latch string hung out and that I extended a cordial invitation to Mr. Du Pont or any of the officers of the Du Pont Company to come to Peoria and to be my guest, and to go to my mills and inspect them, but that I drew the line at a contemptible shyster lawyer that was engaged in the kind of business

he was—Piatt. I advised him, I told him if there was any manhood in him he should stand by the profession he claimed to belong to, and not dishonor it. I told him to say to Mr. Du Pont that if they did not cease hiring spies chasing me with detectives, and hiring spies in my mills, hiring railroad agents to betray me, and furnish information of the shipments from my mills and hiring miners to refuse to use my product, that I would take him into the United States Court and shake him out, and I thought I could keep the Advisory Counsel pretty busy. Mr. Piatt then left the office."

In its instruction to the jury, the Court commented upon some of the evidence above referred to, viz., that which related to the visit of Piatt to Paige, and then charged the jury as follows, which is assigned as Error No. 16, (See Trans., page 3205, folio 3206):

"This, of course, was a reprehensible act. What does such an act, in the light of all the circumstances surrounding it, and keeping in mind other facts in the case bearing upon the keen competition that took place between the defendant's and plaintiff's powders in that district, indicate? The plaintiff was a **newcomer** in a field **already occupied.** Except as to new business, it is inevitable that in order for the plaintiff to place its output it would draw some of the custom that theretofore had been flowing to the defendant or some other competitor. All of them had a right to compete for such business. None of them had the right, however, to use any but lawful methods. To retain one's own customers obtained by lawful means or to secure new ones is lawful, provided no unlawful means are used. **The mere ascertaining to what person or place a competitor's product is being shipped is a legitimate means of keeping tab on the trade, and if a particular**

> **competitor has been making inroads upon the established trade of another, such other may properly keep a surveillance over the conduct of such new competitor;** but, while this is lawful, it may be readily noted that an unlawful use of such information may be made."

It is difficult to understand what the Court meant when it denominated Paige's conduct as "reprehensible", for the further remarks of the Court would seem not only to excuse such conduct, so far as the defendants were concerned, but to justify it.

The Court said:

(a) It must be judged in the light of the "keen competition" between the plaintiff and defendants.

(b) "Plaintiff was a newcomer in a field al ready occupied",—the same idea of defendants' pioneer or prescriptive rights which everywhere pervades this case and which is discussed supra, page

(c) None but "lawful methods" should be made use of to retain one's customers and obtain new ones, but this was a lawful or "*legitimate* means of keeping tab on the trade."

(d) "If a particular competitor has been making inroads upon the established trade of another such other may *properly* keep a *surveillance* over the conduct of such *new* competitor" —again the idea of the defendant's prescriptive right to the trade.

The Court's conclusion that, "while this is lawful it may readily be noted that an unlawful *use* of such information may be made," does not help to a correct understanding of the matter, for

what this unlawful use may be was not explained. The jury could not, therefore, know whether the Du Pont Company used it lawfully or unlawfully. **But it is difficult to understand why, if it was lawful for the defendants to obtain the information, it was unlawful for them to use it.**

In *State vs. Standard Oil Company,* 218 Missouri, 1, the evidence showed that efforts to obtain information of shipments by independants were made through bribery of "tank station agents and railroad employes". Instead of condoning these acts as "lawful" and "legitimate", unless some unexplained "unlawful use" was made of such information, the Court said (page 285):

> "The *plainly evident purpose* of this system of espionage was to prevent the sale of the products of petroleum by the independent dealer."

Surveillance and spying on another's business is almost universally condemned by publicists and courts. In fact, we have no knowledge of any other authority of importance, besides the Trial Court in this case, that has condoned and excused such offences as being lawful and legitimate for any purpose.

It has been made a criminal offence in Connecticut, Iowa, Massachusetts, Michigan, Nebraska, Nevada, New Jersey, New York, North Carolina, Rhode Island, South Carolina, Virginia, Washington and Wisconsin.

In *Sirkin vs. Fourteenth Street Store,* 124 App. Div., 384, Judge Laughlin said that the New York statute was but declaratory of the common law, and that "the Court should not be astute to discover a theory upon which" it could not be enforced.

The act to create a Commerce Court, (36 U. S. Stats. page 553), prohibited the disclosure by common carriers of information concerning shipments in interstate commerce.

Senator Burton explained the reason for this provision as follows:

> "It has developed in judicial proceedings in two instances that certain great industrial combinations maintain information bureaus. Those engaged in the work of these bureaus, by divers methods, none of which I think, can be rated as commendable, obtain from railway corporations, or through their agents, information relating to the business of their minor competitors. For example, a great establishment ascertains that a competitor intends to ship into the State of Ohio, Indiana, or Texas a consignment of merchandise. The amount of that merchandise becomes known to the information bureau, and the name of the consignee is also ascertained. Using this information, a strenuous effort is made to prevent the competitor from disposing of his merchandise, from making any sales in the locality to which the shipment is made. An unfair advantage is thus given to the larger establishment, which enables it, in a measure, to crush out competition. I have a mass of information on this subject, if there is a desire that I should read it." (Congressional Record, June 1, 1910, vol. 45, Pt. VII, p. 7207.)

It has formed the basis of some of the most serious charges and proofs in connection with the government prosecutions of the Standard Oil Company, the Reading Company, The Eastern States Retail Lumber Dealers Association; and in several "consent decrees" these practices have been admitted to exist and were enjoined from continuance.

Mr. Waddell's experience and knowledge of the methods of the Du Pont Company brought forcibly home to him the true situation with respect to the purpose of that Company in obtaining information as to plaintiff's customers; for he knew that Piatt's visit to Paige, and the resultant advices which he received from his customers, was but the repetition of practices which had long been a part of the policy and practices of that Company. He testified that this knowledge first made him realize that the plaintiff must fight for its existence, and that it was this that finally prompted him to file a petition with the Attorney General of the United States for the dissolution of the defendants and their co-conspirators as an unlawful combination; he delayed doing so, however, until in May, 1906, when he found that plaintiff was losing all its customers, and to protect it from further loss, he filed a petition with the Department of Justice (Trans., p. 829), giving as his reason for the delay as follows (Trans., p. 1543):

> "I knew, of course, that when I took any open, public action against the Du Pont Company in defense of the Buckeye Company that it meant a fight to a finish and bankruptcy for the Buckeye, and I hesitated as long as I dared and until we had reached the final stages of dissolution of our company before I made a fight in self-defense."

POINT XI.

The reasons given by customers for ceasing to do business with plaintiff, as shown by their letters and by their statements to the officers and agents of plaintiff, should have been received.

Akin to the error just discussed is the theory of the Court as further expressed in the five Errors (Nos. 17, 18, 19, 20, 21) relating to the rejection of testimony concerning the reasons given by plaintiff's customers to its officers and agents for refusing to begin doing business with it, as well as ceasing to continue such business after having once begun.

These relate to:

(a) The rejection of the testimony of John G. Miller, a powder broker of Chicago, concerning the reasons given by his customers to him, for not purchasing plaintiff's powder. (See Assignment of Error No. 17, Trans., page 3207.)

(b) The rejection of two letters from the Central Coal and Coke Company of Kansas City. (See Assignments of Error Nos. 18, 19; Trans., pages 3207-3208.)

(c) The rejection of a letter from the Waverly Coal and Mining Company of Kansas City. (See Assignment of Error No. 20; Trans., page 3208, folio 9624.)

(d) The rejection of six letters from J. H. Somers & Company of Cleveland, Ohio. (See Assignment of Error No. 21; Trans., pages 3209-3213).

The question of the admissibility of the evidence embraced in these five assignments is no longer an open one, since the decision in Lawlor v. Loewe in 235 U. S., 522.

The opinion is quite brief in its recital of the facts shown by the record, but an examination of the briefs in that case shows that the Trial Court, over the objection of the defendants—

(a) "Admitted testimony of a number of witnesses for the plaintiff as to the reasons given by wholesale dealers in hats, who bought hats from jobbers or wholesale dealers who purchased their goods from Loewe & Company, for withdrawing their patronage from these jobbers and wholesale dealers." (See Appellant's Brief, p. 206.)

(b) Allowed to be read in evidence certain letters written by parties to Loewe & Co. informing them of statements by other persons not under oath (Ibid., p. 213).

(c) Received newspaper articles giving reports of boycotts, etc. (Ibid., 216).

The opinion is by Justice Holmes, and upon this point he says:

> "The reason given by customers for ceasing to deal with sellers of the Loewe hats, including letters from dealers to Loewe & Co., were admissible."

Citing 3 Wigmore Evidence, Sec. 1729 (2), which says:

> "A declaration of a present existing *motive* or *reason* for action is admissible—assuming, of course, that the declarant's motive is relevant. * * * The typical instances in which motive becomes material are actions for loss of service or of custom in which it is necessary to show that the customer's or servant's abandonment of the plaintiff was mo-

tivated by the defendant's persuasion or threats; and actions in which the reliance of a person on another's representations becomes a part of the issue. The use of declarations of this sort is fully recognized in numerous precedents."

Among the authorities cited by Wigmore is *Elmer v. Fessenden*, 151 Mass., 161, an action for loss of services of workmen who were caused to leave plaintiff's services by the defendant's false statements that the plaintiff's goods, on which they worked contained poison. Justice Holmes delivered the opinion:

> "If, as may be assumed, the excluded testimony would have shown that the workmen, when they left, gave as their reason to the superintendent that the defendant had told them that the Board of Health reported arsenic in the silk, the evidence was admissible to show that reason in fact. We cannot follow the ruling at *nisi prius* in *Tilk v. Parsons*, 2 C. & P., 201, that the *testimony of the persons concerned* is the only evidence to prove their motives. We rather agree with Mr. Starkie, that such declarations made with no apparent motive for misstatement may be better evidence of the maker's state of mind at the time than the subsequent testimony of the same persons."

In *Mutual Life Ins. Co. vs. Hillmon*, 145 U. S., 285, 295, the rule is established that the existence of a *particular intention* at a certain time is better expressed in *letters* written at that time than by the *memory* of the witness concerning his then state of mind. Also that intent may be proved by contemporaneous oral or written declarations to others made at the time rather than by recollection.

The testimony rejected by the Trial Court all touched upon the vital issue whether the acts charged against the defendants and their co-conspirators had really accomplished the object of "inducing" consumers not to use plaintiff's product.

This testimony related to the effect of the Contract System in tying up the trade; to the policy of making low prices in competitive districts; to the influence on the freedom of the consumer due to fear of retaliation on the part of the Du Pont Company against its contract customers who might venture to patronize a competitor; to the specific attack made on the plaintiff's business, by making it a condition of better prices to the consumer that he would not do business with the plaintiff; and to the actual damages suffered by the plaintiff.

(*a*) *The rejection of testimony of John G. Miller.*

Error No. 17 relates to the refusal of the Court to allow John G. Miller, a witness for plaintiff, while on direct examination, to answer the following questions—he having already been permitted to testify that he had endeavored to sell Buckeye Powder to certain persons whom he knew to be under contract to purchase powder from the Laflin & Rand Powder Company, and that he failed to sell to such persons, and that they gave him reasons why they did not or would not purchase powder of him (Trans., p. 3207):

> "Q. State what those reasons were as given by them.
>
> "Q. Did any of those reasons which were given to you involve the question of these contracts which were in existence?
>
> "Q. Did any of the reasons which were given to you by these parties or any of them

involve the question of special prices that had been made to them by any other manufacturer of powder?"

(*b*) *Rejection of Letters from Central Coal & Coke Co.*

Errors 18-19 both relate to the refusal of the Court to admit letters written by the purchasing agent of the Central Coal & Coke Company of Kansas City to the Buckeye Powder Company. The first of these letters states that the company will soon be ready to enter into a contract for its powder requirements for the next two or three years and asking for a proposition; and the second acknowledging the receipt of prices quoted by plaintiff, but that it was not the successful bidder, (See Trans., pp. 3207-3208.)
(See Trans., pp. 503-506.)

These letters were important to show that the plaintiff's prices were higher than those of its competitors, and as showing an *actual loss* by reason of price cutting of an amount of business which would have been almost sufficient of itself to have absorbed the capacity of its plant, for it was a consumer of between 150,000 and 300,000 kegs per year. (Keith, Trans., p. 506, fol. 1518.)

(*c*) *Rejection of Letter from Waverly Coal & Mining Co. No.* 20.

Error No. 20 relates to the refusal of the Court to receive a letter written by J. W. Ferguson, President of the Waverly Coal & Mining Co. of Kansas City, Kansas, to the Buckeye Powder Company, reading as follows (see Trans., pp. 509-510):

"I wired you to-day cancelling car of CC Special Powder. I am somewhat *tied up with the Du Pont Company* and I am *obliged to do*

this. If you have invoiced this car and it is shipped or if you consider that the powder belongs to us, ship it at once and date your invoices Feb. 16th. Ship by as slow freight as you please, as I do not care for it before the 1st of March, or even the 10th of March. I say this because I do not wish to pay for it until, say, 90 days. If you are willing to do this, ship it as directed, *but don't give me away to the Du Pont powder people. I will be clear of them in a few months."*

This company was *under contract* with the Du Pont Company, and consumed about 4,000 or 5,000 kegs of powder annually. (See Trans., pp. 507-508.) This letter is very important, therefore, in that it shows—

(a) The *influence* of the *contract system.*

(b) The *fear of etaliation* on the part of the Du Pont Company.

(c) The actual loss of profits sustained by plaintiff on a cancelled order for one carload.

(d) The actual loss by plaintiff of a substantial business of 4,000 or 5,000 kegs per year.

(*d*) *Rejection of Letters from J. H. Somers & Co.*

Error No. 21 relates to the rejection of a series of six letters written by the Purchasing Agent of J. H. Somers & Co. of Cleveland, Ohio, to the Buckeye Powder Co. (Trans., pp. 3209-3213.)

The first of these letters states that the writer's attention had been called to Buckeye powder by other large users whose offices were in that city; that the samples of Buckeye powder which he had seen were beyond question as to quality; that some of these other companies were not *tied up by contracts* for their powder and *consequently* could start doing business with plaintiff at once;

that it was a little different with his company, as it was *tied up with a contract* for the next few months, but that it expects to make some change if it can be better taken care of (see Trans., pp. 3209-3210, folio 9628).

The letter of March 8, 1905, reads (see Trans., p. 3211, fol. 9632):

> "We have purchased 7,200 kegs of FF powder since October 1st for these properties and you can tell by these figures about how much we will use per year, especially as the coal business in this particular district last winter was not very good.
>
> "We might say in conclusion that we expect to buy powder a little cheaper this year than last, and this business, no doubt, will be yours if you quote the right price."

The letter of March 25, 1905, says (see Trans., p. 3212, fol. 9634):

> "We have a much better price than the one you have quoted and while we are very anxious to give our friend Mr. Corvin this business, yet we cannot see our way clear to pay a higher price for your powder than we would have to pay for the powder we have been using in the past."

The letter of April 15, 1905, says (see Trans., p. 3212, fol. 9636):

> "In your letter you state if any powder company made us a better price than $1.05 delivered, they were entitled to the business. We have the better price, all right—same being $1.02½, but we had not decided definitely in regard to the Michigan business. As we use a great deal of powder and have always been well taken care of, we want to know positively if we can get powder promptly after we have placed our order for

the same. We have been *signed up* for some time for our powder in Ohio, and have included the Michigan properties in *this contract* in a way that we can purchase powder from the *same company* we purchase our Ohio powder, *providing we do not give you the business.*"

The letter of Aug. 23, 1905, says (see Trans., p. 3213, fol. 9638):

> "We herewith enclose our order No. 1248 for one carload of FF blasting powder, price to be *$1.02½* delivered, as per letter of Aug. 21st. You no doubt have been advised by Mr. Corvin that we are buying our powder for *$1.00* per keg at the present time. We are willing to pay you 2½ per keg on this order, as we are anxious to give your powder a trial."

The foregoing letters were all material as evidence to establish the following issues:

1. The influence of the Contract System in preventing plaintiff from obtaining business.

2. That the prices quoted by plaintiff were *higher* than those quoted by its competitors—plaintiff's price being $1.05 and its competitors' price $1.02½.

3. The *direct* attack made on the plaintiff by its competitors involved in the following extract from the letter of April 15, 1905:

> "We have been signed up for some time for our powder in Ohio, and have included the Michigan properties in this contract in a way that we can purchase powder from the same company we purchase our Ohio powder, *providing we do not give you the business.*"

4. The actual loss of profits on one carload of powder at $1.02½, due to the *cut prices* made by its competitors.

POINT XII.

The Decrees in the "Government Case" which adjudged the defendants guilty of violation of the "Sherman Act" upon an almost identical state of facts, with those presented in this case, and directed their dissolution, should have been received by the Trial Court.

The 22nd assignment of error relates to the refusal of the Court to admit the interlocutory decree and the final decree of the United States District Court for the District of Delaware, in the case of United States of America, petitioner, against E. I. du Pont de Nemours & Company, *et al.*, the same being the equity proceeding brought by the Government for the purpose of dissolving the unlawful combination of which the defendants formed a part.

See assignments and decrees fully set forth at Transcript, pages 3103, 3116. See also 188 Fed., 127.

Erroneous Understanding of the Issues by the Court of Appeals, and Grounds upon which it held the Decrees to be Inadmissible.

The Court of Appeals falls into the error of saying (fol. 9546):

> "The defendants *admitted* their participation in the illegal trade assocation as late as June 30, 1904, but *denied* that such participation continued thereafter."

And again, (fol. 9555):

> "Two distinct defences were therefore set up: (1) A *denial* that the Anti-Trust Act

had been violated by the defendants after June 30, 1904," etc.

The Pleas of all the defendants to the Declaration were general denials of *every charge* (Trans., pp. 36-41); and they strenuously insisted at the trial that at *no* time were they connected with any unlawful combination or association. It was due to their attitude in this respect, and to the obstacles and difficulties which were placed in the way of obtaining the necessary evidence to establish their connection therewith, that the trial occupied so long a period of time.

The record shows that it occupied 72 days (See docket entries Trans., pp. viii-x); but in reality it covered a period of nearly five months.

Three times the Court below refers to "this five months trial" (See fols. 9543, 9561, 9578); as though this fact in some way limited plaintiff's right of review. "No record," it said, "could come unscathed through such an ordeal after a five months trial." And it lightly passes over some of the objections raised by the plaintiff upon the theory that because the trial occupied so long a time plaintiff must have had its day in court.

Indeed, so little merit did the Court below attach to the assignment under consideration, that it questioned whether "the plaintiff is *seriously* insisting that the Court erred in refusing to receive the decrees in evidence" (fol. 9561-9562).

If these decrees had been received, the burden of one issue would at least have been shifted to the defendants, and the length of the trial would have been materially reduced.

The Court below also says that the plaintiff, being a stranger to that proceeding, "could not avail itself in the present suit either of the evi-

dence then given or of the decree," for the reason that "the parties in the two suits were different; the subject matter was different; and the Trial Judge's ruling is so fully justified by the well-established law then existing, that no supporting authority need be cited."

Undoubtedly the general rule is that unless the parties and the subject matter are the same, a former judgment may not be pleaded as an estoppel.

But this rule does not apply here for the reason that there are well-recognized exceptions to the general rule thus stated, and these exceptions exist in the present case.

The exceptions to the general rule are fully discussed by Judge Van Devanter in *Portland Gold Mining Company vs. Stratton's Independence,* 158 Fed., 63. He cites many authorities and a careful examination of these will show that they clearly support his conclusions.

It was strenuously urged in that case that the rule of mutuality of estoppel should apply, that is, "that one may not have the benefit of an adjudication as an estoppel unless he would have been prejudiced by it had it been the other way." To this Judge Van Devanter replied:

> "But it is quite generally held that these objections do not prevent an estoppel where, as here, the one exonerated was the immediate actor and his personal culpability is necessarily the predicate of the plaintiff's right of action against the other, and we think that upon principle this ought to be true."
>
> "Thus it is settled by repeated decisions that the general rule that one may not have the benefit of a judgment as an estoppel unless he would have been bound by it had it

been the other way is subject to recognized exceptions, one of which is that in actions of tort, such as trespass, if the defendant's responsibility is necessarily dependent upon the culpability of another, who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it had it been the other way. And we think it could not well be otherwise, for, when the plaintiff has litigated directly with the immediate actor the claim that he was culpable, and, upon the full opportunity thus afforded for its legal investigation, the claim has been adjudged against the plaintiff, there is manifest propriety, and no injustice, in holding that he is thereby concluded from making it the basis of a right of recovery from another who is not otherwise responsible. To such a case the maxim, 'Interest reipublicae ut sit finis litium,' may well be applied."

The authorities cited by Judge Van Devanter are so much in point that we refrain from occupying the attention of the Court with a discussion of them, except the case of *Anderson vs. West Chicago Street Railroad Company,* 200 Ill., 329, which was a negligence case, and in which it was stated that where the "gist of the action in *each* suit" was the same acts of negligence, the judgment may be pleaded as res adjudicata.

In the present case the acts upon which the *criminal* liability of the defendants depended were the same criminal acts upon which the plaintiff depended to establish the first necessary element of its case—namely, the doing of the things forbidden by Sections 1 and 2 of the Sherman Law, whereby they became an unlawful monopoly and

whereby they monopolized and attempted to monopolize interstate commerce, and "by reason of which" plaintiff was injured in its business.

The Court below claims support for its conclusion that the decrees were not admissible, because the "Clayton Law" has been enacted since the trial of this case, Section 5 of which provides that such decrees, "hereafter" entered, shall be received in actions similar to the one at bar.

But we think that this section only enacted into positive statute, the rule which had already long existed, unless perchance, it weakened the existing rule by making the decree prima facie only, whereas before it might have been *conclusive* evidence of the facts therein recited. It may well be argued that Section 5 of the Clayton Law took away from the private litigant, under the Sherman Act, some of the rights which he before had with respect to the effect of the former decree.

Grounds of Admissibility of Decrees as Contended for by Plaintiff.

The grounds upon which plaintiff relies to sustain the admissibility of the decrees are as follows:

1. As evidence of the *fact* that the defendants had been adjudged guilty of forming the *same* combination and conspiracy in restraint of trade which was in issue.

2. As an *admission* of guilt.

I. As Evidence of a Pertinent Fact.

There is a great difference between the force of a decree or judgment when considered as to its form, or as to the regularity of the proceedings in

which it was obtained, and when considered as evidence of the *fact* which it declares. In such respect a judgment is conclusive not only upon the parties, but it cannot be impeached collaterally even by strangers.

In *St. Louis Mutual Life Ins. Co. v. Cravens*, 69 Mo., 72, it was said:

> "It is insisted that the decree was not proper evidence, because the plaintiff in this suit was not a party to the suit in which the decree was rendered. It may be conceded that when a judgment is offered in evidence 'both the litigants must be alike concluded, or the proceedings cannot be set up as *conclusive* against either.' (1 Greenleaf Ev., Sec. 524.)
>
> "While this is an established principle it is also settled that the verdict and judgment in *any* case are always admissible to the fact that the judgment was rendered, or the verdict given. It is conclusive evidence of the *fact* of the rendition of the judgment, and *all the legal conclusions resulting* from that fact, *whoever may be the parties to the suit in which it is offered.*"

See also 1 Greenleaf Ev., Sec. 538 (16th Ed.).

In the *National Cash Register* Case, 222 Fed., 599, 629, which was a suit by the government under the Sherman Act, the admission of a decree of infringement of a patent, although reversed on appeal, was upheld as being prima facie evidence of probable cause that improper use of the patent laws had been made against the rights of competitors.

The authorities are unanimously to the effect as stated by Van Fleet Coll. Attack, page 86, that:

"A decree made by a Court of Equity is conclusive in a Court of Law, and vice-versa."

See also 23 Cyc., 1222 and 1223 and citations from almost every state and many U. S. courts.

A judgment or sentence in a criminal action is admissible in a subsequent civil suit, which is civil in form, but penal in character to enforce a penalty or forfeiture of property against the same defendant, on the same state of facts.

Coffey vs. United States, 116 U. S., 436.

It was not denied in the trial of the present case, but was freely conceded, that the prosecution of the government case was begun upon a petition filed by Mr. Waddell, and that he was active in assisting in the prosecution of the case till the final decree. He freely stated that he did not file his petition with the government until he realized that the plaintiff had been practically forced into bankruptcy by the conduct of the defendants, and freely admitted that his ultimate object in so doing was to secure redress for the injuries sustained by the plaintiff, and that he always had in contemplation the bringing of the present suit, as soon as the status of the defendants should be ascertained in the government proceeding.

He was virtually treated as the plaintiff in the equity suit as well as in the present case, and the admission of the decrees would have been an exceedingly appropriate exercise of the discretion of the Court, if it was a matter which was discretionary with it, for the reason that the Trial Court gave the defendants unlimited opportunity, which was seized with avidity, to impress their theory upon the jury that Mr. Waddell was the

real plaintiff in the government suit; that he was the one that inspired it; that he furnished the government with the necessary evidence which he had obtained while in their employ; that he did it maliciously to force the defendants to buy him off. **This theory was further accentuated by the Court, as though fully approved, in the instructions which it gave to the effect that the plaintiff stood in a different relation in its right of recovery under the Sherman Act, by reason of the knowledge which Mr. Waddell had of the illegal methods and policies long carried out by the Du Pont Company and its associates.** (See supra, Points IV, V.)

Assuming all this to have been true, the jury was entitled to know the *result* of that proceeding, **not merely that the defendants were decreed to be an unlawful monopoly, but what the defendants had been found guilty of doing.** This knowledge would, at least, have gone a long way to remove from the minds of the jury any impression of bad faith on the part of Mr. Waddell. It was not fair to the plaintiff that its founder, chief officer, and principal witness, should have been discredited with this suspicion, and the result of the proceeding which he caused to be instituted kept from the jury. It must have had the effect of justifying him in their eyes.

2. As an Admission of Guilt.

The decree should have been received by the Court, because it constitutes an *admission of guilt,* which was a *pertinent fact* in issue and should have been received by the Court as evidence to the same effect as any other admission of the defendants might have been received.

The final decree was a "consent decree" entered after months of negotiation between the parties.

The interlocutory decree declares that twenty-eight corporations and individuals (including the defendants) "are maintaining a combination in restraint of interstate commerce of powder and other explosives," and enjoins them from continuing. It directs that the defendants be dissolved and that a further hearing be had to enable the petitioner and the defendants or any of them to submit further information "to the end that this court may ascertain and determine upon a plan or method for such dissolution which will not deprive the defendants of the opportunity to recreate out of the elements now composing said combination a new condition which shall be honestly in harmony with, and not repugnant to, the law." (Trans., p. 1816, fol. 5447.)

The final decree recites that a plan for the dissolution of the combination and monopoly has been presented by the petitioner "to which said plan the twenty-seven defendants *do not object.*" The plan is thereupon set forth and the "defendants are respectively directed to proceed forthwith to carry said plan into effect" (p. 1819, fol. 5457).

By accepting the privilege of the interlocutory decree to present further information to the court, and by *consenting* to the plan submitted by the petitioner to create "a new combination which shall be honestly in harmony with and not repugnant to the law" the defendants admitted their guilt.

This Court, speaking through Mr. Justice Brewer in *Last Chance Mining Co. vs. Tyler Mining Co.*, 157 U. S., 683, 691, announced the rule which we contend for in the present case in the following clear language:

> "The essence of estoppel by judgment is that there has been a judicial determination *of a fact,* and the question always is, has there been such determination, and not upon what evidence or by what means was it reached. A *failure to answer* is taken as an admission of the truth of the facts stated in the complaint, and the Court may properly base its determination on such admission. Suppose the defendant files a denial, and on the trial the only evidence is the testimony of a witness *to an admission made by the defendant out of court,* and upon such testimony the judgment is rendered. Is it any the less a judicial determination because resting simply upon proof of the defendant's admission, and yet in principle what distinguishes that case from this? In each the judgment is resting upon an admission of the party against whom the judgment is rendered, and does it make any difference *in what form* that admission is presented to the judge?"

The case of *United States vs. Parker,* 120 U. S. 89, is an authority in support of our contention that by the acquiescence of the defendants in the final decree which was entered against them, they are *concluded* to the same extent that they would be by making any other admission of *a fact.* It finally established their *status* in the eyes of the law as an unlawful combination when raised in any other proceeding, whether they are parties thereto or not.

In the Parker case there was a judgment of dismissal which recited "that the subject matter in suit had been *adjusted and settled* by the proper parties in Washington."

The Court said:

> "This recital, together with the judgment founded on it, was entered *by the consent* of

the attorney representing the United States, who thus in open Court officially admitted the *effect of the evidence* to be as claimed."

To the same effect is *Nashville, etc. Ry. Co. vs. United States,* 113 U. S. 261.

POINT XIII.

Where a part of a conversation is put in evidence by one party, the other party is entitled to explain, vary or contradict it.

The Court refused to permit plaintiff's witness, R. S. Waddell, while under redirect examination, to state what the information was which he gave to plaintiff's attorneys upon which the allegations set forth in paragraph 11 of the plaintiff's amended declaration were based—counsel for defendants on cross-examination having already been permitted to read the said paragraph to the said witness and thereupon to ask him whether he gave his attorneys the information upon which said allegations were based, to which the said witness replied that he did and would be glad to state them to the jury, and such refusal is assigned as Error No. 23. (See Trans., p. 3213, folio 9639.)

Paragraph 11 of the Amended Declaration recites the history, form, purpose and effect of the Contract System. It is impossible to understand the motive or purpose of the Defendants' counsel in reading this paragraph to the jury, and following the reading by an inquiry whether the witness had given plaintiff's attorneys the information upon which the allegations were based, unless it was to show—

(a) That the allegations were framed by counsel recklessly and without any information upon which to base them.

(b) That they were extravagant and unfounded in fact.

(c) That the witness gave the information, if he gave it at all, knowing that it was unfounded in fact, and that his character as a witness would be impeached thereby.

That the last of the three motives above suggested was probably the correct one, is consistent with the whole policy of the defense, namely, to make a personal attack on Mr. Waddell and weaken his standing as a witness before the jury.

Furthermore, the jury were entitled to know all the facts relating to all of the allegations, and the witness should have been permitted to give them the benefit of all the information he possessed on the subject, and plaintiff was entitled to take advantage of the opening thus afforded to submit evidence which it might not otherwise be able to offer.

> "It is a familiar rule that one who induces a trial court to let down the bars to a field of inquiry that is not competent or relevant to the issues cannot complain if his adversary is also allowed to avail himself of the opening."
>
> *Warren Live Stock Co. v. Farr*, 142 Fed., 116.

The prompt response of the witness that he had given the information to his attorneys, and would be very glad to state it to the jury, evidently came as something of a surprise to the examiner for he at once dropped the subject and did not permit the witness to state it to the jury. (Trans., p. 1248.)

The relation of the defendants to the Contract System, and the effect of that system upon the plaintiff, was one of the most important issues in the case, and the defendants hotly contested every

attempt upon the part of plaintiff to sustain the theory of the Declaration.

Stanley v. Beckham, 153 Fed., 152, is a case as nearly in point as a case can well be. The plaintiff on his cross-examination was asked concerning a certain conversation which he had had with the defendant, and the questions were allowed and he answered such questions as were put to him. Upon redirect he was asked to state his further recollection about what was said at the conversation, and an objection thereto was sustained by the Court. The opinion which was delivered by Judge Van DeVanter says:

> "Error is assigned upon the rulings preventing the plaintiff from giving in rebuttal his version of the conversation mentioned, and we entertain no doubt that in this there was error, for, where the whole, *or a part of a conversation is put in evidence by one party, the other party is entitled to explain, vary or contradict it* (*Carver v. United States,* 164 U. S., 694; 17 Sup. Ct., 228, 41 L. Ed., 602; *Home Benefit Association v. Sargent,* 142 U. S., 691, 12 Sup. Ct., 332, 35 L. Ed., 1160; *Chicago City Railway Co. v. Bundy,* 210 Ill., 39, 44, 71 N. E., 28; *Hoggson, etc., Co. v. Sears,* 60 Atl., 133, 136, 77 Conn. 587). * * *
>
> But it is said there was no offer to show the substance of the testimony proposed to be elicited by the questions propounded and excluded in rebuttal, and therefore it does not appear that their exclusion was reversible error. The premise is correct, but not the conclusion. The controlling rule, applicable where the witness testifies in person at the trial, and not by deposition, as stated by Mr. Justice Harlan, in *Buckstaff v. Russell,* 151 U. S., 626, 637, 14 Sup. Ct., 448, 452, 38 L. Ed., 292, is this:

"'If the question is in proper form, and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the court, in its discretion, or on motion, may require the party in whose behalf the question is put, to state the facts proposed to be proved by the answer; but, if that be not done, the rejection of the answer will be deemed error or not, according as the question upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded.'

"And this rule is recognized in other cases. *Oriegt v. Hedden,* 155 U. S., 228, 235, 15 Sup. Ct., 92, 39 L. Ed., 130; *Atchison, Topeka & Santa Fe Ry. Co. v. Phipps,* 60 C. C. A., 314, 316, 125 Fed., 478, 480."

POINT XIV.

A hypothetical question not embracing all the facts upon which the hypothesis is based, or upon which an expert opinion is asked, is inadmissible.

The declaration alleged that the defendants had "induced" its customers to abandon it, specifying the manner in which this was done and the character of the "inducements" made use of, as follows:

(a) By the employment of evilly disposed persons to enter the mines of plaintiff's customers to stir up discontent among the miners and to instill into their minds prejudice against plaintiff's powder, so as to cause them to refuse to use it, thereby to *"induce"* the customer to reject it. (See Trans., p. 18, fol. 54.)

(b) By the employment of influential miners to circulate among the miners of the various coal mines of plaintiff's customers and distribute cash, liquors, etc., among them to "induce" them to believe that it was for their interest to boycott plaintiff's powder, and that these "inducements" succeeded in forcing customers to abandon plaintiff. (Trans., p. 19, fol. 56.)

(c) By "inducing" each customer of black blasting powder to enter into *contract* with the defendants to give them their exclusive trade for a term of years (Trans., p. 21, fol. 62).

(d) By making and increasing *rebates* on such contracts. (Trans., p. 22, fol. 65.)

(e) By persistently *underbidding* plaintiff until it was compelled to surrender the trade of the customer and leave the defendants a clear field, as a result of which, in most cases, the defendant succeeded in "inducing" the customer to enter into contract with it (Trans., pp. 24-25, fols. 72-74).

With a view of disproving these allegations, defendants submitted the depositions of about 75 persons who had been customers of the plaintiff, (many of these being insignificant customers, not having made more than one purchase of from two to a dozen kegs) and to whom they propounded a question similar to the one set out below. All these were objected to and the objections overruled by the court. The following question propounded to Olive Taylor, one of these witnesses, is selected as typical of the others. (See Assignment of Error No. 24; Trans., p. 3214):

> "Q. Now, Mrs. Taylor, in a suit instituted in the United States District Court for the District of New Jersey, by the Buckeye Powder Company against the E. I. Du Pont de

Nemours Powder Company and two other companies, known as the International Smokeless Powder and Chemical Company and the Eastern Dynamite Company, the Buckeye Powder Company, in answer to a demand for the names of customers of the Buckeye Powder Company induced by the defendants, or by the other persons or corporations I will name to you, the Buckeye Powder Company has given the name of Howarth and Taylor as one of the customers of the Buckeye Powder Company which was induced by these defendants and persons which I will name, to abandon the purchase of powder from the Buckeye Powder Company. The names of these persons are: Thomas Coleman Du Pont, Pierre S. Du Pont, Alexis I. Du Pont, Alfred I. Du Pont, Eugene Du Pont, Eugene E. Du Pont, Henry E. Du Pont, Irene Du Pont, Francis I. Du Pont, Victor Du Pont, Jr., Arthur J. Moxham, Hamilton M. Barksdale, Edmund G. Buckner, Frank L. Connable, Jonathan A. Haskell, and the following corporations: International Smokeless Powder and Chemical Company, E. I. Du Pont de Nemours and Company, E. I. Du Pont de Nemours and Company of Pennsylvania, Du Pont International Powder Company, Delaware Securities Company, California Investment Company, Delaware Investment Company, Hazard Powder Company, Laflin & Rand Powder Company, Fairmont Powder Company, and Judson Dynamite and Powder Company. Will you now state whether or not any of the persons that I have mentioned here, or any of the corporations which I have mentioned in this question, or any agent or representative of those persons or corporations, ever induced you, as purchasing agent for your husband, Daniel Taylor, trading as Howarth & Taylor, not to purchase powder of the Buckeye Powder Company?

"A. No, sir."

It will be seen by the foregoing digest of the al-

legations of the declaration concerning the *inducements* charged to have been the cause of the loss of plaintiff's customers, that the question propounded by the defendants as above set forth has no relevancy or bearing whatever upon any of them.

The answer as given states a pure conclusion of the witness without the slightest knowledge on his part what the real grounds of complaint were.

It may be said that this could all have been cleared up by cross-examination. The answer to this is that a party is not bound to cross-examine a witness in order to protect himself against an irrelevant and improper question propounded by his adversary. Nevertheless, some cross-examination was had and many of the witnesses did, in fact, testify to the presence of the very "inducing" motives charged.

The cross-examination also shows that most of them knew none of the persons, firms or corporations whose names were stated to them in the question; and that they could think of no possible means of "inducement" except *personal importunity* on the part of some of the parties named.

This very witness testified that she did not know the persons whose names were read to her (Trans., p. 2081, fols. 6243-6244):

> "Q. Then, how were you able to answer so promptly that question in the negative, as you did? A. Had a gentleman *come* to influence us not to buy Buckeye powder, I should certainly have known it.
>
> "Q. You are basing your statement that no one influenced you, upon the fact that no person *came to you personally* and asked you to abandon Buckeye powder in so many words? A. They didn't.

"Q. And that is the reason you made that statement? A. Yes, sir."

While we do not believe that any question could be framed which would cover the grounds alleged in the declaration, unless it included all of the "inducements" alleged in the declaration there might have been some rational basis for presenting a hypothetical question to the witness providing he was first qualified upon the subject of who were the "agents" or "representatives" of the defendants named in the question.

The question as generally understood by the witness is one which suggests a reflection upon his intelligence and it is not to be supposed that he would admit that he could be moved by personal importunity. His sense of pride would naturally prevent such a confession.

The answer of Mr. Donk, President of the Donk Coal & Coke Co. of St. Louis, displays resentment. He said (see Trans., p. 2354, fol. 7061):

"I would say there is nothing to that. There ain't nobody induced me to quit that, unless I choose it. I never allow myself to be bamboozled with anybody, or by any concern or individual."

But on cross-examination he admitted that he had been "induced" to buy Du Pont powder by the very methods which plaintiff charged, viz., (a) by better prices (fol. 7061, also letters from the Donk Coal Co., pages 2357-2358), and (b) by the Contract System (fol. 7062), (c) by trouble with his miners over the use of Buckeye powder, notwithstanding he used over 17,000 kegs and that the powder itself proved satisfactory (fols. 7064-7065), (d) that the only representative of the Du Pont Company whom he knew was Mr. Spicer (fol. 7065)—the same Mr. Spicer who

brought about the strike among the miners of the Great Northern Fuel Company against Buckeye powder, and who, it is fair to infer, was the influence who "induced" the Powder Committee at Mr. Donk's mine to demand Du Pont powder (fol. 7065).

Furthermore, all the witnesses who were under contract with the Du Pont Company to purchase all their explosive requirements of it, were, in reality, parties to the combination in restraint of trade, and it was not to be expected that they would testify against their own interests.

This very witness, Olive Taylor, and her husband, Daniel Taylor, were conducting the business of Howarth & Taylor, where the evidence shows that nearly all of these inducing motives were operating in their own mines. (See supra, pp. 204-207).

The case of Emil Brechnitz of Belleville, Illinois, illustrates very forcibly the folly and impropriety of the question. He had already testified on his direct examination that one of the reasons why he left the Buckeye Company and went to the Du Pont Company was that they offered him a contract at a *lower* price than the Buckeye Company would make, and that "I was gradually losing out on the trade and, in thinking it over with my brother, I decided to tie up with the Du Pont people, and in that way retain the trade we had at the time." (See Trans., p. 549, fol. 1647.) Mr. Brechnitz testified on his cross examination by Defendants' counsel as follows (see Trans., pp. 570-571, fol. 1710):

> "Q. After you purchased Buckeye powder, were you induced in any way by the Du Pont Powder Company or any of its agents or

representatives to cease the purchase of powder from the Buckeye Powder Company? A. No."

On redirect examination the following occurred (Trans., p. 571, fol. 1713):

"Q. Now, in answer to the last question which was propounded to you by counsel for the defendants, which you answered in the negative, how did you arrive at that conclusion? A. I answered 'No.' There was no one *come* and induced me to quit buying from the Buckeye.

"Q. Do I understand you to mean that no one came and *personally* asked you to stop buying? A. Yes, sir.

"Q. But you don't wish to retract anything you said about *these other methods* as to competitive prices? A. *Those were the main reasons.*"

It should be remembered that Mr. Brechnitz was a merchant and that he bought powder to resell. (See Contract with Buckeye Powder Company, Trans., p. 2961.) He gave the names of a number of his customers that he had lost in this manner (Trans., pp. 549-550), and by reference to the "95-cent List" (Plaintiff's Exhibit 1248, Trans., p. 2735) we find that some of these customers were given the 95-*cent rate and went to Du Pont Company*, Trans., p. 2691.) He gave the names of a

The Harmful Effect of the Frequent Repetition of This Question.

The evil of this method of attempted disproof of the charge made by plaintiff that the defendants had driven it out of business by "inducing" its customers to abandon it, was the more noticeable because of the numerous repetitions of the same question and answer within the hearing of the jury, which must have made its impress on their minds as a complete refutation

of the allegations of the declaration. Most of the customers whose depositions were thus presented were insignificant, and the sum total of their trade could have had no effect on plaintiff's business. But this fact might well be lost sight of in the minds of the jury by the constant reiteration of the broad denial of something which was not charged as an "inducement"—namely, the *personal* solicitation and importunity of plaintiff's customers on the part of defendants.

The opinion of the Court below shows that even it has been misled by this line of examination, just as the jury was. It says (see Trans., page 3185, folio 9554):

> "Many witnesses testified that the defendants did not interfere with the plaintiff's customers or entice them away."

There is no support for these remarks on the part of the Court, unless it be found embraced within the question and answer now under consideration. If this was a proper method of eliciting the facts concerning the various means by which the defendants "induced" them to abandon plaintiff, then the above remarks of the Court are supported by the record. Otherwise not.

How much the more easily must the jury have been misled when this same question was repeatedly presented in their hearing. **No amount of subsequent explanation by the witness on cross-examination, that he did not have in mind the kind of inducement charged by the plaintiff, could efface the constant repetition of this long and formidable-sounding question and answer.**

POINT XV.

Plaintiff was entitled to recover *nominal* damages, in any event, and besides, all damages resulting as the natural and proximate consequence of the unlawful acts of the Defendants, whether such acts were directed against the Plaintiff or not, and such damages were recoverable not only for the loss in value of physical assets, but also for the value of the good will, and for loss of profits, both actual and future.

Questions of damages become important here because the jury might have determined all the other issues in favor of Plaintiff and yet, under the erroneous instructions of the Court, have found that plaintiff had suffered no damage whatever.

THE DAMAGES CLAIMED BY PLAINTIFF.

(a) Plaintiff alleged that the true and fair value of its plant, mills, business, and *good will* was $500,000, and that it was compelled to dispose of the same for $70,000; and therefore claimed damage for the difference, amounting to $430,000. (See Trans., page 30, folio 90.)

(b) Plaintiff also alleged that its plant and mills had a total capacity of 300,000 kegs of powder per annum; that its inability to keep its plant working at its full capacity was "due to and was the *natural and proximate consequence* of the wrongful and unlawful acts of the defendants"; that it was prevented from manufacturing and selling, during the period of the five years it was in business, a total of 937,376 kegs; that the fair

and reasonable profit, after deducting all expenses connected with the manufacture, sale and transportation, was thirty cents per keg, and plaintiff therefore claimed damage at 30 cents per keg on 937,376 kegs, amounting to the sum of $281,212.80. (See Trans., pages 32-33, folios 96-98.)

(c) Plaintiff also claimed damage for the loss of *future* profits, that is, after it *had ceased* to do business, because "it was unjustly and unlawfully interfered with in its right to *continue* in business." This claim was made at the rate of thirty cents per keg on 300,000 kegs per annum from September 19th, 1908, (when it ceased to do business) to the time of beginning suit, which amounted to a total of $270,000 more. (See Trans. page 33, folio 99.)

(d) Plaintiff further claimed damages for the difference between what it actually received, and what was "the fair profit on the powder which it actually manufactured and sold", and which it wholly lost by reason of the unlawful acts of the defendants—that is, at the rate of thirty cents per keg on 467,167 kegs; making a total of $139,149.10, less the amount already received, after deducting the actual cost thereof including transportation. (See Ibid.)

The claims of damages above summarized amounted to a total of $1,020,361.90, and when trebled as prayed for pursuant to Section 7 of the Sherman Act, amounted to $3,061,085.75.

The opinion of the Court below tends to give a wrong impression regarding plaintiff's attitude with respect to this subject of damages, thus (See folio 9543):

> "Treble damages were asked for amounting to nearly $4,000,000, although this demand was much reduced at the end of the trial."

There were only two claims of damages other than those above enumerated. One of these amounted to $5000, which plaintiff alleged it was compelled to pay in excess of the fair value of certain powder-making machinery which it required, by reason of the monopoly which the Du Pont Company had acquired in such machinery. The defendants pleaded the Statute of Limitations, which plea was upheld by the Court, and thus cut off all losses suffered previous to September 18th, 1905. This carried with it the $5000 claim, as well as such loss of profits as had occurred during the two years previous to this date.

The only claim which was not insisted upon by the plaintiff, was the claim of $500,000 as punitive damages. This was for purely legal reasons based upon the fact that the conclusion was reached by plaintiff's counsel during the trial that this claim was not properly set up, and plaintiff did not desire to involve the verdict in any question of legality.

Questions of Damages as Submitted to the Jury.

The Assignments of Error concerning the subject of damages relate almost entirely to the instructions.

The Court instructed the jury—

(a) That because the evidence tended to show that during the period previous to September 18th, 1905, (which was the only period during which Plaintiff made any actual profits at all), its profits were only three and one-seventh cents per keg, this must serve as the sole basis for a determination of any recovery for loss of profits for powder *actually* manufactured and sold. (Error No. 26.)

(b) That there was no evidence to support the allegation that thirty cents per keg was a reasonable profit. (Error No. 25.)

(c) That plaintiff could not recover for any loss of profits on account of powder which it was *prevented* from manufacturing. (Error No. 27.)

(d) That plaintiff could not recover for the loss of *good will* (Error No. 28).

The Court submitted the question of damages claimed on account of loss of value of the physical assets (that is the real estate, buildings and machinery); but instructed the jury that cost was not, in itself, a test of value, and that while it might be considered as a circumstance, it could in no event be taken as "very persuasive" evidence. (Trans., page 2499, folio 7497.)

From the foregoing it will be observed that the Court withdrew from the jury, the consideration of every claim of damage except that based on powder actually manufactured, and on the value of the physical assets. As to the former, it limited the recovery to not to exceed 3-1/7 cents per keg and as to the latter, the jury may have reached the conclusion, under the court's caution against accepting "cost" as any evidence of value, that plaintiff had suffered no damage from this source.

I. Plaintiff was entitled to nominal damages in any event.

In any view of the facts, the jury should have returned a verdict for at least nominal damages. This has been specifically held in the following cases:

Thomsen vs. Union-Castle Mail Company, 166 Fed. 251;

Reaffirmed in *Pennsylvania Sugar Refining Company vs. American Sugar Refining Company,* 166 Fed. 254, 260.

In the latter case it was said:

> "A person has a legal right to engage in a lawful business. If he is unlawfully excluded from exercising this right, when he is prepared and intends to exercise it, he suffers an injury for which the law awards damages—he is 'injured' within the meaning of the Federal Statute. He may be unable to prove specific compensatory damages, but in stating the infringement of his legal rights he states a cause of action at least for *nominal* damages and may perhaps so state it as to call for exemplary damages."

In *Lowry vs. Tile, etc. Association,* 106 Fed., 38, 47, it was said:

> "If the evidence in the case in the matter of damages to the business of the plaintiffs has not shown any real and substantial damage to their business by reason of the association, apart from conjecture or mere speculation, then they are not entitled to any substantial compensation, and no verdict in damages should be rendered in their favor, except in the *sum of the dollar or other trifling amount.*"

II. One who has been forced by an unlawful combination in restraint of trade to sell his merchandise at a small profit or at no profit at all, is entitled to have his loss of profits estimated according to what is a fair profit thereon, and is not confined to an estimate based on his actual earnings.

Assignment of Error No. 26 (See Trans., pp. 3215-3217), is very lengthy but for the purposes of this brief it can be summarized in a few words.

The Court instructed the jury that plaintiff was seeking to recover anticipated profits and that it claimed to have made a profit in its business for the first twenty-two months, previous to September 18, 1905, amounting to 3 1-7 cents per keg; that if they should find that this claim was sustained by the evidence it might be made to serve as a basis for allowing damages for loss of profits, subsequent to September 18, 1905, and, in that event—

> "You will allow as profits upon the kegs manufactured during such subsequent period all or so much of such 3 1-7 cents per keg as you shall find was the profit per keg on the 224,683 kegs as is shown were made during the three years following September 18, 1905."

There was, however, a controversy between the parties as to whether any actual profit had been made by plaintiff; and the jury may have found that the defendants' contention was the correct one, in which event, under the Court's erroneous instruction, no allowance would have been possible on account of loss of profits.

The testimony shows that the plaintiff actually manufactured and sold from September 19, 1905, to September 18, 1908, a total of 224,683 kegs of powder. By reference to plaintiff's exhibit 1396, (Trans., pages 2895-2931), a complete summary of the powder sold during this period, giving the name of the customer, the number of kegs sold, the price received, etc., is fully set forth. From this it appears, as shown by the summary of the exhibit on page 2895, that the average price per keg received after deducting freight, rebates, etc., was 92.1 cents per keg.

The rule adopted by the Trial Court attempted to confine the jury to the hard and fast doctrine,

which has been applied to the ascertainment of the loss of profits growing out of a breach of contract:

> "Until the Congress gives a different rule to estimate damages in such cases, as this the old rules are applicable" (Trans., p. 2506, fol. 7518).

The Trial Court makes the right to recover anticipated profits depend altogether upon whether there was an established business as will be seen from the following extract from its charge to the jury. (See Trans., page 2506-7, folios 7518-7521):

> "Were it not for the fact that the plaintiff claims that in the twenty-two months preceding September 18th, 1905, it had made a profit notwithstanding the unlawful restraints that it says were then being exerted upon the powder trade, I should be compelled to withdraw the question of profits from you in toto; but this contention of plaintiff requires me to submit the evidence that bears upon that to you upon this question of anticipated or expected profits; for while it is the general rule that such profits are not recoverable, an exception has been made in many jurisdictions in cases where an *established* business has *proved profitable in the past,* and where by competent proof it is made reasonably certain that but for an interruption chargeable to the defendant, the amount of the expected profits would have been made. Profit alone, however, is not enough to bring an existing business within the exception. In addition, the business must have been carried on for such a length of time as to make it reasonably certain that it had passed the period of experimentation and was capable of successfully surmounting the ordinary commercial vicissitudes that beset similar enterprises. What length of time may be necessary to obtain such a status may be a question of law or fact, according to circumstances. A shorter

period during which financial or industrial depression or severe competition was encountered would permit of the submission of the question whether the business was sufficiently established to admit to the recovery of anticipated profits; whereas a much longer period of business life, but during which none of such depression or competition was experienced, might as a matter of law forbid the consideration of such question at all."

And again at p. 2509, folio 7526, referring to the period during which plaintiff claimed a profit the court says:

"If it be a fact that during that period the plaintiff made profits, they furnish a sufficient basis for comparison with subsequent years for me to submit it to your consideration; but it will be for you to say whether as a fact that period was sufficiently long to furnish a basis for comparison with subsequent years. If you should find that it isn't sufficient to furnish such a basis, even though you should have found that during the twenty-two months the plaintiff made a profit, the further inquiry as to profits during the remaining years must end, and no profits can be allowed."

III. The evidence showed that thirty cents per keg was a reasonable profit to make.

Plaintiff claimed that it was entitled to receive as damages a sum equal to what would amount to a *fair* profit on its powder, regardless of what its actual profits had been during any period of its operation, or in fact, whether it had made any profit at all.

The Court instructed the jury as follows, which is assigned as Error No. 25 (See Trans., p. 3215, folio 9644):

"Plaintiff claims thirty cents a keg profit,

but there is *no evidence* in the case that would justify the conclusion that that was a fair profit."

At the request of the defendants, the Court again charged the jury that plaintiff had "no right to fix upon what Mr. Waddell deems a fair profit and claim compensation for loss of that." (See Trans., page 2514, folios 7541.) It is a sufficient answer to say that the plaintiff did not make this claim solely upon what Mr. Waddell deemed a fair profit. His opinion as an expert was certainly competent evidence and it was abundantly supported by the testimony of some of the defendants own witnesses. He testified as follows (See Trans., pp. 774-775.):

"Q. Will you state to the Court and jury the different elements that you used in making up this total figure which you have given as the fair price at which you should have sold Buckeye powder to the various customers which are set forth on that exhibit? A. I took into consideration the cost of the powder at the mills, based upon the raw material, labor and cost of manufacturing complete, and the cost of selling, overhead expense; then added to that the cost of freight for the reason that all powder in carloads is sold delivered, and I had to meet that requirement, because that is the general requirement of the United States, that all powder for many years has been delivered in carloads. I added the approximate freight for a given distance and, based upon my experience in the powder business for many years I regarded the price fixed for each of the districts, each of the locations named on this sheet where powder was sold, as a reasonable and fair price at which it should be sold.

"Q. Now, what in your judgment is a reasonable and fair profit or was a reasonable and fair profit for you to have made upon

such powder as you sold while you were manufacturing black blasting powder during the year 1903 to 1908 inclusive? A. Approximately thirty cents, but it would be impossible to make the great variety of prices in a given locality that the addition of thirty cents to the fractional freights would make, so that it has been the custom to fix a price for a district and I follow the same rule as the custom of the country in the sale of powder and fix a price of $1.20 for the State of Illinois, which would approximately give thirty cents in every particular—the average would be thirty."

Mr. Haskell, one of the Vice-Presidents of the Du Pont Company testified that $1.25 east of the Mississippi River and $1.35 west of the Mississippi River, was a *reasonable* price for black blasting powder in the Central District of the United States, in carload lots, and in other cases where it had to be transported from distant mills. (Trans., p. 1752). This would produce a profit of thirty cents per keg because according to the evidence, the cost of making and selling powder (including freight charges) was about ninety-five cents. (See Discussion of Point VIII, Supra, page 181.)

Mr. Moxham, another of the Vice-Presidents of the Du Pont Company, made an address at a meeting of the Trade Association in December, 1902, where the question of prices was discussed. Said address is in evidence as Plaintiff's Exhibit 22. (Trans., pages 2539-2556). As a part thereof the table of average prices for black blasting powder received for a period of 12 years (page 2556), taken in connection with the other testimony in the record relative to the cost of making powder, furnishes very convincing evidence in support of Mr. Waddell's opinion. The table is as follows:

Year		Kegs	Average Price
1890	(Jany. to June)	145,235	$1.65
1891	(June 1890 to June 1891)	171,100	1.55
1892	(June 1891 to June 1892)	151,833	1.52
1893	(June 1892 to June 1893)	174,519	1.22
1894	(June 1893 to June 1894)	128,058	1.07
1895	(June 1894 to June 1895)	151,315	.995
1896	(June 1895 to June 1896)	171,692	.92
		Avg.	.98
1896	(July to December)	103,000	1.09
1897	(Jany. to December)	173,879	1.24
1898	(Jany. to December)	145,349	1.266
1899	(Jany. to December)	230,786	1.214
1900	(Jany. to December)	284,700	1.183
1901	(Jany. to December)	292,422	1.173
1902	(To Sept. 1st)	216,890	1.14

Commenting upon this table, Mr. Moxham said (see Trans., p. 2545):

> "An examination of this will show that the history of the powder business has been that of a steady reduction in price up to the year 1896. The lowest price reached is contemporaneous with the lowest price basis in this country of all other staples; so far so good. But going beyond this, it shows none of the reaction towards higher figures that has ruled in every other business in the years following, viz 1896 to 1902. Prices generally have increased over 100% in other staples during the last five years. This is true of those businesses that were subject to the keenest and freest competition in common with the rest. In powder we find the increase has been from $.98 in 1896 to $1.14 to date in 1902, an increase of only 16 cents. We believe that the price to- day *is abnormally low.*'

If the price was *abnormally low* at $1.14 per keg, what should it have been? This question was answered by Mr. Moxham by recommending an increase to $1.25 east of the Mississippi River, and $1.35 west.

We think that the foregoing facts, as shown by the record, sufficiently dispose of the charge that plaintiff rested its contention that 30 cents per keg was a fair profit to be made, on Mr. Waddell's opinion alone; and also shows that the prices which prevailed while the plaintiff was in business were *abnormally low,* not as the result of natural and normal conditions, but due to a situation brought about by the defendants to force plaintiff out of business; that plaintiff was thus kept from making and selling its goods at a profit, as alleged, and that it is entitled to be reimbursed for the loss thus sustained.

IV. The evidence showed that plaintiff possessed a plant with a minimum capacity of 250,000 kegs and a maximum capacity of 300,000 kegs of powder per annum, and was financed and prepared to operate to full capacity and that it had the customers ready to purchase its output, but was prevented from supplying such customers and operating to capacity by unlawful acts of defendants. It is, therefore, entitled to recover for loss of profits on powder which it was prepared to manufacture and sell, up to the normal capacity of its plant.

The Court instructed the jury as follows, which is assigned as Error No. 27 (see Trans., p. 3217, fol. 9651):

> "As the evidence does not furnish us with a legal basis upon which we can determine, as a matter of fact, that the plaintiff could have sold on a profitable basis any more powder than it actually sold, no allowance can be made for such unmade or unsold merchandise."

As a legal basis upon which the jury might estimate the injury to plaintiff's *future* business, it was first shown that plaintiff had the plant and facilities for conducting such business, and also that there were consumers of large quantities of powder who were ready and willing to *become* its customers, and others who were already its customers who were willing to *continue* as such, but who were compelled to cease to do business with plaintiff by reason of the unlawful acts of the defendants. It was further shown that these customers consumed much more than a sufficient amount of powder to have absorbed all that the plaintiff could produce, if working to its full capacity.

It is difficult to understand how a legal basis could be established with any more certainty than was done in this case, as the following review of the evidence will show:

(a) As to the Plant.

The evidence showed that the fair capacity of the plaintiff's plant was 250,000 kegs per annum, and that plaintiff was financed and equipped to operate its plant at its full capacity (Trans., p. 820, fol. 2458; pp. 832-833, pp. 940-941); that if plaintiff had been permitted to carry on its business without interference from the defendants, instead of making 224,683 kegs from September 19, 1905, to September 18, 1908, it would have made 737,500 kegs. The difference between its capacity and its output was 512,817 kegs.

(b) As to Its Customers.

All that is necessary to take such losses out of the *speculative* class is to show that plaintiff had the customers who were ready to continue with

it, or to come to it, if left free to do so in fair and open competition.

The evidence shows that the following coal operators who had already done business with plaintiff were willing and even anxious to continue to do business with plaintiff, or were willing to become customers of plaintiff, but were prevented from doing so by the acts of the defendants:

	Annual Consumption.	
Applegate & Lewis.....	2,000 to 4,000	Kegs
C. G. Brechnitz.....	10,000 to 12,000	"
Great Northern Fuel Co...	4,000 to 5,000	"
Indiana Bituminous Co...	4,000 to 5,000	"
Waverly Coal Co.....	4,000 to 5,000	"
Wear Coal Co.....	40,000 to 50,000	"
Northwestern C. & M. Co..	8,000 to 10,000	"
Clark Coal & Coke Co.....	21,000 to 25,000	"
Sunday Creek Coal Co....	75,000 to 100,000	"
Central Coal & Coke Co..	150,000 to 200,000	"
Donk Coal & Coke Co...	25,000 to 30,000	"
	343,000 to 556,000	Kegs

There were, besides, the following coal operators who were willing and ready to do business with plaintiff; but, while the testimony shows that they used a large amount of powder, it does not show how much: Charles F. Keeler & Co., New York Coal Company, DeCamp Coal & Mining Company, J. H. Somers & Company.

Inasmuch as the minimum capacity of the plaintiff's plant was 250,000 kegs, it would seem that the plaintiff sufficiently satisfied the reasonable requirements of the rule, if any exists, which imposes upon it the obligation to show that it could have sold its output as a legal basis from which to estimate its losses in this respect.

The fact that there is no binding contract between the person injured and his usual customers makes no difference in the application of the rule. It will be *presumed* that the customers would have continued their voluntary patronage but for the wrongful acts.

8 Cyc., p. 653.

In *United States v. Keystone Watch Case Co.*, 218 Fed., 502, 512, it was said:

> "And it is not sufficient to answer that these competitors appear to have withstood the attack with more or less success, and that their total trade did not always, or even often, diminish. Where or how they made up the loss that they must have sustained is not material; it is certain that they must have lost whatever trade they had previously enjoyed with those jobbers that yielded to the threat of the defendant's circular; and it seems clear, therefore, that in this degree at least there was an unlawful restraint of trade. In other words, if this section of the trade had not been taken away from the defendant's competitors, we may reasonably suppose that they would have retained it; and this fact seems to be a final answer to much of the evidence, the tables and lists, of varying scope and value, that have been laid before us, and were offered to show that on the whole not much damage, if any, was done by the offending circular and the defendant's unlawful conduct."

In *Lawlor vs. Loewe*, 235 U. S., 522, the basis of which was a conspiracy to prevent a manufacturer from carrying on his business, this Court affirmed the action of the Circuit Court of Appeals (209 Fed., 721, 739) in upholding an instruction which charged "that the plaintiffs are

entitled to recover all damages which are the proximate and natural result" of the unlawful acts charged.

The principle laid down in *United States vs. Kissel,* 218 U. S. 601, is applicable here. The American Sugar Refining Company obtained the control of a majority of the stock of the Pennsylvania Sugar Refining Company, through a pledge made to secure a loan, and then voted to suspend business, thus *preventing* a "would-be competitor" as the court describes it, from carry ing on business.

An action under the 7th Section of the Sherman Act was instituted by this would-be competitor and disposed of in *Pennsylvania Sugar Refining Company vs. American Sugar Refining Company,* 166 Fed., 254. The defendants urged that because the plaintiff "was not engaged in business at the time of the conspiracy it had no established business to injure," and that legal damages could not be predicated upon the prevention of the carrying out of a mere "naked intention to engage in interstate commerce." The court answered this contention as follows (See page 260):

> "In the very recent case of *Thomsen v. Union Castle Mail Steamship Co.,* 166 Fed. 251, this court said: 'It is as unlawful to prevent a person from engaging in business, as it is to drive a person out of business'. A person has a legal right to engage in a lawful business. If he is unlawfully excluded from exercising this right, when he is prepared and intends to exercise it, he suffers an injury for which the law awards damages—he is 'injured' within the meaning of the federal statute."

The rule is affirmed in *American Banana Co. vs. United Fruit Co.,* 166 Fed. 261, 264.

In *Dowd vs. United Mine Workers,* 235 Fed. 1, 7, the rule as laid down in the above cases is followed and applied to a situation where certain coal companies were not actually engaged in interstate commerce at the time the alleged unlawful acts were committed, but were *preparing* to do so and were prevented from so doing by the acts of the defendants. It was urged that the damages suffered were "indirect, incidental and too remote." The Court said: "It is the *source* of the injury, and not the character of the property injured, which constitutes the test of recovery."

In *United States vs. Patterson,* 59 Fed. 280, 283, Circuit Judge Putnam said:

> "Neither the letter of the statute nor its purpose distinguishes between strangling a commerce which has been born, and preventing the birth of a commerce which does not exist."

In *United States vs. Union Pacific Railroad Company,* 188 Fed. 102, 117, affirmed 226 U. S. 61, Circuit Judge Adams said:

> "A contract to strangle a threatened competition by preventing the construction of an immediately projected line of railway, which if constructed, would naturally and substantially compete with an existing line for interstate traffic would be in violation of the Anti-Trust Law."

That damages are recoverable for the *future* effects of an injury, resulting as the natural and proximate consequence of acts committed by the defendants has been sustained by the following cases in this Court:

Washington & Georgetown R. R. Co. vs. Harmon, 147 U. S., 571;

McDermott vs. Severe, 202 U. S., 600;
Chesapeake & Ohio Railroad vs. Carnahan, 241 U. S., 241.

V. The Court charged that the establishment of a profitable business was essential to good will; that plaintiff's business had not been profitable and that therefore it possessed no good will and withdrew the question of damages for loss of good will, from the jury.

The Court gave the following instruction, assigned as Error No. 28 (see Trans., p. 3218):

"So far I have been dealing with the value of the plant simply as a tangible or physical property. A manufacturing plant, however, may have another and additional value, namely, its good-will; and as the plaintiff claims that it has suffered damages to its good will, that phase will now be considered. Good-will may be defined for present purposes as 'the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or from celebrity or reputation for skill, or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.' **Establishment of a profitable business is the essential of the good-will. Where that does not exist there can be no good-will.**

"The very contention of the plaintiff on another branch of the matter of damages is that from September 18, 1905, until the time that it ceased doing business, it was conducting an unprofitable business; and as the losses said to have been incurred during this period largely overcame the profits claimed to have

been made for the twenty-two months preceding we have as the only basis for a good-will, not that a pecuniary advantage or benefit was secured by the plaintiff during the time it was in business, but that it would have done so except for the wrongful acts of the defendant, and that for a part of such time it actually did make a profit.

"True, a person may be *wrongfully prevented* from acquiring a good-will; and ethically such a wrong is just as injurious as if an established good-will was injured by such wrongdoing. The rule in allowing as well as estimating damages, however, is a practical, rather than *an ethical* standard, and this excludes all damages that are purely speculative and contingent. To attempt to create out of unknown quantities a good-will for the purpose of giving it a value when no past conditions establishing a good-will exist, would be but a pure speculation, and, therefore, not allowable. *The claim of damages for good-will therefore must be disallowed.*"

The distinction which the Trial Court here makes between that which is *ethically* wrong and that which is legally wrong is contrary to the plain doctrine of the authorities just cited (*supra*, p. 293) to the effect that it is just as *legally* wrong to *prevent* a person from engaging in business as it is to destroy an existing business.

The *making of profit* has only an incidental relation to the question of good-will. If one's good-will is sufficient to enable one to attract to oneself a large amount of business from which a profit is made, this may show that the good-will is *more valuable*, than it would be if it was operated at a loss. But many a business has been known to operate at a financial loss and yet, because of the reputation which it had established for fair dealing, or for high quality of its goods,

or perhaps on account of its location, it possessed a good will among consumers—and even in the hands of a receiver or of the bankruptcy court, its good will was its most valuable asset.

Nature of the Evidence Concerning Good-Will.

But the evidence shows that notwithstanding the unlawful acts of the defendants, which *prevented* plaintiff from acquiring that good-will to which it was entitled and would have had but for such acts, it did have *some* good-will.

(a) The location of the plant.

(b) Good-will of customers.

(c) The rule used by accountants.

(a) LOCATION OF THE PLANT.

Plaintiff alleged in its declaration that its plant was favorably located near the City of Peoria, with respect to railroad facilities and transportation, and had the benefit of favorable freight rates and that it was in the center of a large consuming district which afforded a vast market for its output, and that the natural increase in the consumption of black blasting powder in the district reached from its mills was sufficient of itself to have absorbed the entire output without diverting any of the trade from already established channels of supply.

These allegations were sustained beyond question. In fact, little attempt was made to controvert them.

The testimony shows that Peoria is the second city in the State of Illinois in size, has twelve railroads, all on trunk lines or connecting with trunk lines, and that it is a most desirable distributing point. That after the plaintiff located

its plant it obtained freight rates which put it on an equality with the mills of the defendants (see Waddell, Trans., pp. 789, 790). It was not only convenient to the Illinois coal fields, but also to those in Iowa, Michigan, and in the Northwest through to Montana (Ibid., p. 790).

In 1903 the production of coal in the State of Illinois was about 36,000,000 tons and it increased until in 1908 it was about 54,000,000 tons (Trans., p. 791, fol. 2373). There was an increase every year in the amount of the powder required to mine the increased amount of coal produced, equal to at least 250,000 kegs additional to take care of the new trade (Trans., p. 794, fol. 2380).

The requirements for a location for a powder mill are peculiar by reason of the hazardous nature of the business. They are well described as follows (Waddell, Trans., pp. 761-762):

> "Q. Tell the jury what requirements in your judgment were necessary for you in obtaining a proper location for a powder mill? A. The location must necessarily be on an important railroad that was capable of making rates and securing good rates from other railroads, and where sidetrack facilities could be obtained. It must be located a long ways, fully a one-half mile distance, from any inhabited dwelling, to comply with the laws of the State. That necessitated a very remote section where no part of the land was within one-half mile of an inhabited dwelling. The location must have good water facilities for boilers, steam purposes; it should be rough ground where there is natural protection in valleys and ravines and timbered well for protection of one mill from another, otherwise barricades would have to be built between mills.

"Q. Protection in what respect? A. From explosions—in the event of explosions. They should be widely separated and in separate valleys if possible. The location must be near enough to a village or town or city to afford church and school facilities for the workmen; they would not be satisfied in a remote country district. There were a number of requirements, all of which must be complied with to make a suitable powder site."

All of these requirements were obtained in the site which was selected for the plant of the plaintiff. (Trans., p. 763.)

(b) Good Will of Customers—Wide Acquaintance and Experience of R. S. Waddell—The Salesmen.

Mr. Pierre S. Du Pont, while testifying as a witness for the plaintiff, stated that when the 1902 Du Pont corporation took over the properties belonging to the 1899 Du Pont corporation, it acquired a large amount of intangible assets, such as *good-will;* and among those which he enumerated was *"good-will of the customers"* (see Trans., pp. 101-102).

It is admitted that Mr. Waddell, the president of the plaintiff, was one of the most experienced men in the powder business in the United States at the time when it began business. He had served as agent for the Du Pont and Hazard Companies for a period of over twenty years and had built up a large acquaintance among the consumers of all kinds of explosives in a large part of the United States. He was thoroughly familiar with the requirements of the various sections of the country in the way of explosives and he had proved himself to be a successful salesman. He

had established many personal friends among the consumers of explosives who were willing and anxious to do business with him if they could do it on equal terms with other manufacturers of black blasting powder.

Mr. Moxham testified that at the time when Mr. Waddell started out to establish the plaintiff he knew more about the powder business and trade than anybody. "He had almost all the knowledge that the company had about that at that time;" that it was his duty to come in contact with the customers themselves during the twenty odd years of his experience (Trans., p. 679, fol. 2037). He thought that Mr. Waddell had a perfect right to go out and establish a business if he wished to and take advantage of his experience and ability in the powder business (Trans., p. 680, fol. 2039).

The following customers told why they wanted to do business with plaintiff:

Mr. R. E. Lewis, of the Applegate & Lewis mines, at Hanna City, Illinois, testified that his firm was anxious to use Buckeye powder because (a) of its nearness to their mines, which would enable them to keep a smaller amount on hand at one time and (b) because they obtained better results from its use in the way of quantity of output and better coal, and less screenings, and (c) because it was not so harmful to the roof of the mine as Du Pont powder (Trans., pp. 630-631). The reason for the inability of this mine to make use of Buckeye power is fully discussed elsewhere (see supra, pp. 209-221).

Mr. Tennant, President of the Indiana Bituminous Company a consumer of from 10,000 to 25,000 kegs of powder per year, testified that before

plaintiff began business his company was a customer of the Du Pont Company, and that he changed from Du Pont powder to the plaintiff "through friendship for the management of the Buckeye Company" (Trans., p. 517); and that he went back to the Du Pont Company because they made him *lower* prices (Ibid., p. 519). A letter written by this same witness to the plaintiff on February 2, 1905, is conclusive upon this point (see Trans., pp. 515-516). The following extract is important:

> "I note the receipt of your letter of the 26th. *I am loath to withdraw my trade from you. The treatment and product have been satisfactory in the past and relations agreeable,* but in these close times I feel we have to sacrifice our friends when it *costs us money to hold them.*
>
> "I will do this, however, as a *sort of farewell.* I will take one car of powder from you —a small car not above 400 or 500 kegs, and pay you $1.05. I won't be sure about the 60 days' payment, but perhaps we can use the powder by that time and will try to satisfy you."

Mr. Horace Clark, President of the Clark Coal & Coke Company at Peoria, Illinois, testified that he was a stockholder in the plaintiff and anxious to do business with it, but was unable to do so on account of the attitude of his miners. The reason for this attitude is elsewhere discussed (see supra, p. 202). In a letter written by Mr. Clark to the plaintiff on December 28, 1907, he says:

> "We only wish it was in our power to use Buckeye powder exclusively, but as you know, our miners positively will not use anything but Du Pont, and much as we *would like to help out our friends,* it seems as if we cannot do it" (see Trans., p. 446, fol. 1337).

Mr. Brechnitz of Belleville, Ill., was a stockholder of the plaintiff, and was also a large customer during the early period of its business. He was not a mine owner, but he was a merchant who bought powder to resell, and at the time when he became a customer of the plaintiff he had a large number of customers to whom he disposed of the powder. (See list of customers, Trans., pp. 2691-2692.)

He was able to make a contract with the Du Pont Company to furnish him powder at 95 cents per keg, with the privilege of the use of its magazine, which he valued as being equal to 3¼ cents per keg additional to him, and he, therefore bought his powder at 91¾ cents. (See Trans., p. 551, fol. 1653.)

Mr. Clarence G. Thurston, Secretary and Treasurer of the Northwestern Coal & Mining Company of Bevier, Missouri, became a customer of the plaintiff, through his friendship for Mr. Waddell, when it began business and remained a continuous customer from that time down to the time when plaintiff ceased business. He bought a total of 47,760 kegs of powder during this period. He transferred his trade at once to the successor of plaintiff, the Western Powder Company, and has continued to do business with that company since (see Trans., p. 511).

Mr. Edward Shirkie, of Terre Haute, Indiana, who was President and Treasurer of the Indiana Fuel Company and consumer of 2,500 kegs of blasting powder per month, gave an order to the plaintiff "through friendship to Mr. Waddell" (see Trans., p. 2313, fol. 6939). He had a contract, however, with the Indiana Powder Company and was unable to continue to do business with the plaintiff.

Mr. John W. Ferguson, President of the Waverly Coal and Mining Company of Kansas City, Kansas, a consumer of between 4,000 and 5,000 kegs of black blasting powder per year, was desirous of doing business with the plaintiff and did do some business with it. He was, however, compelled to cease to do business with it on account of a contract with the Du Pont Company (see Trans., pp. 509-510).

In addition to Mr. Waddell's experience in the powder business and acquaintance with the trade as an element of good-will, is the character of plaintiff's salesmen and agents. Among these were the following:

John G. Miller had previously represented the Laflin & Rand Powder Company for about ten years, and had a very wide acquaintance with the trade. He became a stockholder of plaintiff, and solicited the trade of those whom he had known while acting for the Laflin & Rand Company (Trans., pp. 324-325).

E. C. Burroughs, a salesman nearly all his life, with headquarters at St. Louis.

P. P. Laughlin, a salesman for the Ohio Powder Company for about twenty years, and after that with the Du Pont Company until he entered the employ of plaintiff (Trans., p. 776; also pp. 944-945).

The above facts are sufficient to show that plaintiff possessed *some* good-will; and it was for the jury to determine its amount and value.

(c) THE RULE USED BY ACCOUNTANTS IN DETERMINING GOOD-WILL SHOWS THAT PLAINTIFF HAD SOME GOOD-WILL, EVEN ACCORDING TO THE COURT'S THEORY THAT IT MUST BE BASED ON EARNINGS.

Mr. Armand Bruneau, a witness for the plaintiff, and an expert certified public accountant, gave the rule used by accountants in calculating good-will (see pp. 1808-1809):

> "The rule is to take the average earnings of a concern for a period of time and multiply those earnings by from three to five, and from the total thus arrived at deduct a reasonable amount for depreciation; then deduct interest on the capital invested; and deduct a sufficient amount for a reserve fund."

The depreciation ranges from 2½ to 7½ per cent.; but in the case of a manufacturing concern, 5 per cent. is a reasonable amount. Having determined the depreciation, he would determine the interest on the capital invested in the plant and machinery; and then the amount needed for a reserve fund, which depended on the character of the business, and which was usually an amount equal to the dividend paid. Where the character of the business was hazardous the reserve fund would have to be larger in order to meet the contingencies, as in the case of a powder plant that might blow up. He would then deduct from the total amount of the earnings a proper sum for depreciation and the balance after the deductions would represent net profits.

He sums up the deductions as follows (see Trans., 1811, fol. 5433):

> "We take the amount of depreciation; second, the interest on the capital invested,

and, third, an amount to provide for contingencies and reserves according to the nature of the business. For instance, in the case of a street railway company, they set aside a certain percentage of their earnings to provide for accidents. They have accidents to passengers, and eventually those passengers get damages, and they set aside a sum to cover that."

Mr. Bruneau says the net result for a period of one year should be multiplied by three in order to get the average annual earnings (see Ibid., p. 1812).

Von-Au v. Magenheimer, 115 App. Div. (N. Y.), 87.

This rule shows that plaintiff was entitled to *some* allowance for good-will based on its admitted earnings of 3 1-7 cents per keg previous to September, 1905.

POINT XVI.

Unless the judgment of the District Court is set aside and the foregoing errors corrected, the 7th section of the Sherman Act is a dead letter, and the grip of monopoly upon the destinies of the people will be immeasurably increased—Points and errors reviewed.

We think that in view of the foregoing discussion of the law and the facts, a re-reading of the summary of Points and Assignments of Error set out supra, pages 8-21, will convince the Court that every one of these assignments there pointed out has been shown to be well taken, and that the Court below erred in refusing to set aside the

judgment entered against the plaintiff in the District Court (Assignment No. 1; Trans., p. 3198, fol. 9594), and, instead, affirming the same (Assignment No. 2; Tran., p. 3199, fol. 9595).

We submit that this is not a case where the exercise by the jury of their fundamental right to determine the disputed issues is in question; but the errors grow out of the reception or rejection of evidence and the refusal of the Court to submit to the jury the most vital issues in the case, upon the ground that there was no evidence to support them.

The necessity of pointing out this evidence which is embraced in the five printed volumes of the Transcript and hundreds of exhibits, must be our explanation and apology for the great length of this brief.

The evidence clearly shows that the Eastern Dynamite Company and International Smokeless Powder Company acted *in combination* with the Du Pont interests, from the time they were organized down to the time when they were taken over and became a part of the defendant Du Pont Powder Company, and that they continued to so act thereafter during the entire period of their corporate existence; and it was therefore immaterial, in law, whether they actually participated in any of the overt acts or not. But even if the rule were otherwise, the evidence shows that they did actually participate in overt acts. It was, therefore, error for the Court to direct a verdict in favor of these two defendants (Point I.).

The evidence also shows that the Equitable and Austin Powder Companies acted *in combination* with the Du Pont interests almost from the time of their inception, and that the Du Pont interests

exercised control and influence over the affairs of these two Companies, not only by reason of their large stockholdings therein, but because of their close affiliation by interlocking directorates and otherwise with the remaining stock interests, and also that such influence and control continued after the Trade Association was merged into the corporate body of the defendant Du Pont Powder Company; and that the Du Pont Company knew of, and influenced, the purchase of plaintiff's plant by Messrs. Olin and Lent as a part of the plan to monopolize the trade in explosives. It was, therefore, clearly error to take this question away from the jury (Point II.).

The evidence was overwhelming that the defendants sold their product below cost when necessary to drive competitors out of business (Point VIII.), and that they employed influential miners to stir up opposition and boycotts against the use of plaintiff's powder (Point IX.), and it was clear error to withdraw these questions from the jury.

Furthermore, the evidence shows that the defendants made lower prices in competitive districts than in non-competitive districts, at the same time and under the same general conditions; and that they tied up the trade in explosives by means of long-time rebate contracts; and that by these and other methods they "induced" plaintiff's customers to abandon it and prevented it from obtaining other customers; and it was error to deny plaintiff the right to further support this contention from the writings and statements of customers and others acquainted with the facts, and also error to permit the defendants to confuse these issues by hypothetical inquiries which did not embrace a statement of these, and the other, inducements alleged (Points XI., XIII., XIV.).

It is clear that plaintiff's right of action under

the 7th section of the Sherman Act is single and indivisible, and that by requiring plaintiff to elect whether to stand upon Section 1 or 2 of said Act, plaintiff was denied the right to have many of the unlawful acts and agreements of the defendants considered by the jury in their legitimate effect, under the law (Point III.); and furthermore, that plaintiff was entitled to have the benefit of all the facts available to establish the guilt of the defendants under both of said sections, and that evidence of their conviction of the acts declared unlawful by both sections, was a pertinent fact, and that the decrees in the equity case should have been received (Point XII.).

It is self-evident that the plaintiff does not stand in any different relation, under the law, than it would have stood if it had "come into existence before the development of the influence" of the defendants in the explosives field; and that the motives of Mr. Waddell, and the knowledge which he acquired while in the employ of the defendants, touching their power and policies with respect to competitors, did not in the least degree abridge his or plaintiff's right to enter that field, nor to recover for such injuries as he or it might suffer by reason of the continuance of such power and policies (Points IV. and V.); and we do not doubt that this Court will say that it was grave error, and exceedingly harmful, in an action of this character, to instruct the jury that competition is necessarily a "fight" in which the victor, under the law, is permitted "to go away with the spoils" (Point VI.); nor do we fear that this Court will uphold the doctrine that the defendants were justified in maintaining an espionage over plaintiff's officers by means of detectives, for the purpose of preventing it from obtaining employes with which to carry on its business (Point

VII.), or in maintaining a "surveillance" over its business by the employment of spies for the purpose of "keeping tab" on its customers, or for any other purpose whatsoever (Point X.).

Obviously, plaintiff was entitled to recover for all injuries by it sustained, whether such injuries resulted on account of losses upon business it *actually* conducted, or upon business which it was *prevented* from conducting, including the loss of its good will; and such losses should be calculated upon the fair profit which plaintiff would have received on its product had it not been unlawfully interfered with, regardless of whether it made any actual profit in such business as it was able to carry on; and the Court was in error in instructing the jury otherwise (Point XV.).

Under a statute which provides for the recovery of *all damages* sustained by one who has been injured in his business through illegal and criminal acts, it is impossible in the very nature of the case, to follow the connecting thread from every cause to every effect. The proofs submitted met all reasonable requirements of the rules for the ascertainment of damages, and the Trial Court was in error in holding otherwise. "The law has "been upheld, and therefore we are bound to en- "force it, notwithstanding these difficulties", said Justice Holmes in the *Swift Case,* 196 U. S. 375, 396.

This Court has uniformly upheld the Sherman Anti-Trust Act as have been founded upon well-established and sound principles of public policy, and has insisted upon a rigid enforcement of its equitable and criminal provisions. It has, however, been claimed by many that the remedies provided in the equitable and criminal arms of that Act, have failed to accomplish the object of

Congress—to prevent and abolish monopolies in restraint of trade. Its violators have proceeded upon the theory that it is impossible to "unscramble a scrambled egg", and that, come what will, the *status quo* can never be restored; that dissolutions can do no more than cause inconvenience, and possibly a slight increase in cost of operation, but that recourse may always be had to the consumer to "pay the bill".

We venture to suggest, therefore, that the *civil* remedy given to persons injured, furnishes the most practicable and effective means of enforcement. If private individuals who have been special objects of attack by these unlawful combinations were encouraged by the Courts to seek the remedy provided by the 7th section of the Sherman Act, and if the path of such litigants were cleared of all unjust obstructions and restrictions, and were in fact made easy of travel, the result would be felt *directly* by violators of the law, and would tend to cause them to hesitate before entering upon a policy of deliberate infringement of public as well as private rights.

But if the theories followed by the courts below in the present case are approved, then the 7th section of the Sherman Act is virtually a dead letter. No private litigant can overcome the tremendous difficulties which the plaintiff was required to face. If he is to be held to ancient and technical rules of pleading; if he must prove all his allegations by direct and positive evidence, and nothing may be left to inference; if he must show that each member of the conspiracy actually participated in all, or in fact any, of the overt acts; if he must prove their guilt *out of the mouths* of the guilty parties themselves; if he must show that he stands in a different relation in his right to the protection guaranteed by the Anti-

Trust Act, than he would have stood if he had entered into business before the unlawful combination came into existence; if he must clear himself of all suspicion that he did not intend to conduct a legitimate business; if his competitors had a right to follow him about with detectives to prevent him from obtaining employes, or for any other purpose; if they had a right to maintain a "surveillance" over, and thus "keep tab" on, his trade for the purpose of acquiring the secrets of his business; if, instead of being permitted to develop a legitimate business in legitimate competition, he must engage in a "fight" in which the victor is justified in "going away with the spoils"; if he may be subjected to a price-cutting contest in which the combination has the power, and does not hesitate to exercise it, to sell its goods at a loss, if necessary in order to prevent him from obtaining business, relying upon the certainty that it can make up its losses in other portions of the country where his influence does not reach; if he must submit to the stirring up of prejudice, boycotts and strikes against his product among the ultimate consumers thereof; if he must be deprived of the right to show by the written statements of customers themselves, the "inducements" and methods made use of by the guilty parties to secure their trade and cause them to abandon him; and if, in addition to all this, he must be restricted in his ability to establish losses to an amount based on his *actual* profits, and denied the right to recover for such losses as he may have sustained by reason of having been *prevented* from doing business, then, we repeat, that the 7th Section of the Sherman Act may as well be stricken from the statute books.

Respectfully submitted,

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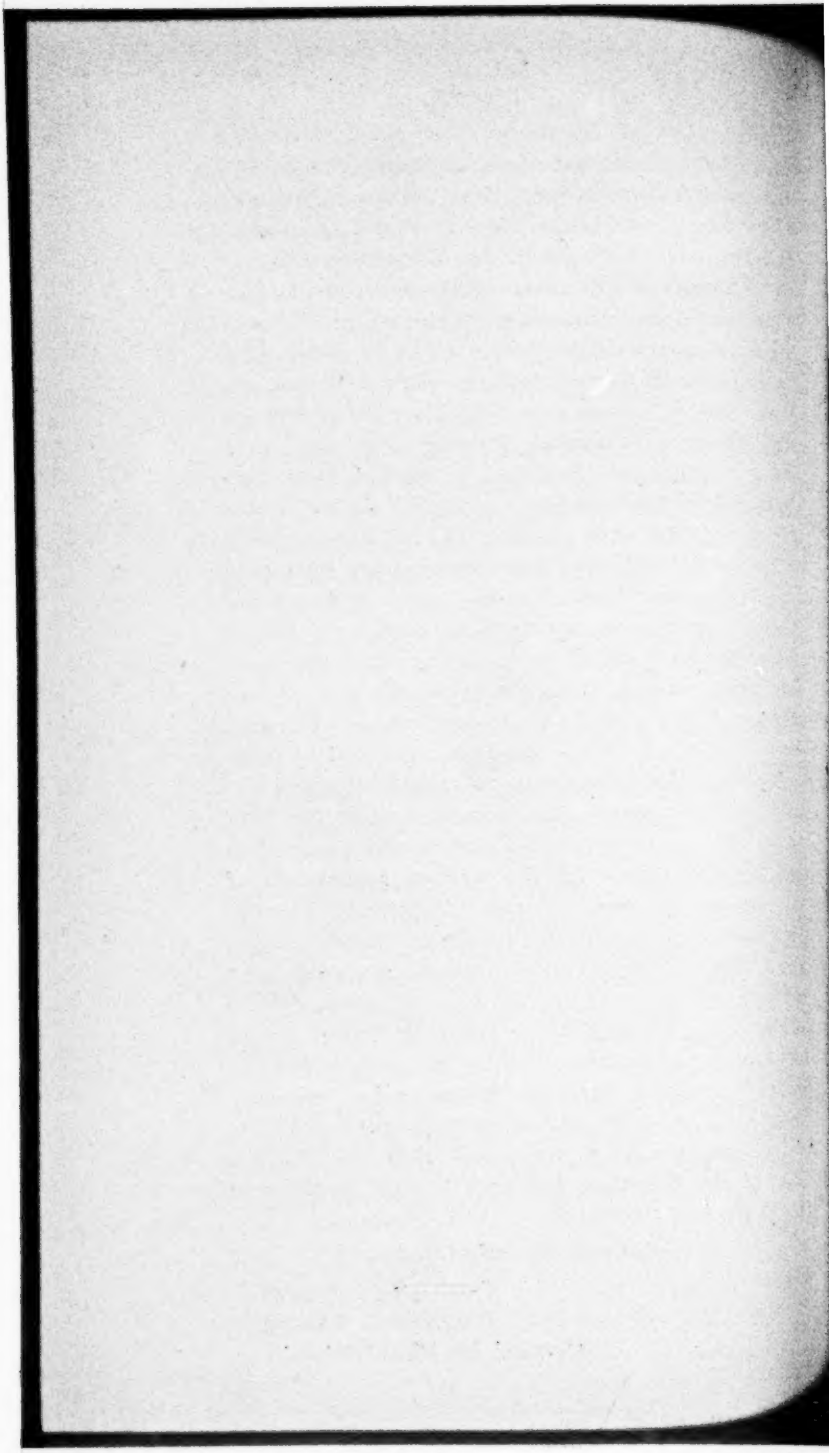
Counsel for Plaintiff-in-Error.



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FILED
APR 28 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

October Term, 1916

THE BUCKEYE POWDER COMPANY (a Corporation)

Plaintiff-in-Error

against

E. I. DU PONT de NEMOURS POWDER COMPANY et als.

Defendant-in-Error

Assignment of Errors

ADDENDA TO BRIEF OF PLAINTIFF-IN-ERROR

Owing to the fact that the Assignments of Error consist mainly of Extracts from the charge of the Court, and must therefore be set out in full (Rule 21, Subd. 2), they necessarily are of considerable length. It was, therefore, deemed best to summarize these assignments with the "Principal questions," and this was done at pp. 8-21 of the brief. Each assignment is, however, afterwards set out in full under the respective Points as they are discussed separately.

For the convenience of the Court, the Assignment of Errors as set forth in the record at pp. 3198-3220 of the Transcript are here given in full.

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—1917—

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

THE BUCKEYE POWDER COMPANY (a Corporation), Plaintiff in Error,

against

E. I. DU PONT DE NEMOURS POWDER COMPANY (a corporation of New Jersey), EASTERN DYNAMITE COMPANY (a corporation of New Jersey), INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY (a corporation of New Jersey), Defendant in Error.

Assignment of Errors.

Now comes the Buckeye Powder Company, plaintiff in error, and makes and files this, its Assignments of Error:

The United States Circuit Court of Appeals for the Third Circuit erred—

1. In refusing to set aside the judgment of the United States District Court for the District of New Jersey entered against plaintiff in error, in

the above entitled cause, on the 20th day of April, 1914, at the April Term of said Court, 1914.

2. In affirming the judgment of the District Court of the United States for the District of New Jersey, entered against plaintiff in error on the 20th day of April, 1914, at the April Term of said Court, 1914.

3. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

> "The suit is brought by the Buckeye Powder Company and has proceeded to trial against three defendants. The evidence, however, fails to support any participation by the Eastern Dynamite Company and the International Smokeless Powder and Chemical Company, and my instructions to you are that you return a verdict of no cause of action in their favor."

4. In refusing to correct the error of the District Court in making an order requiring the plaintiff in error to make an election whether under its declaration it would rely upon the first or second sections of the Act of Congress of July 2, 1890, commonly known as the Sherman Act.

5. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

> "This suit is unique in many respects. The plaintiff, as a corporation and as a competitor in the powder business, is due to the efforts of R. S. Waddell, its chief witness in the suit. He organized it shortly after he separated himself from his employment with the defendant with which and its predecessors he had been identified

for about twenty years. His services, while in the employment of the Du Pont interests brought him in touch with their business policies and operations in the vending of powder. He knew of the existence of the trade associations and of such of the restraints and limitations put upon its members as related to the apportionment of the trade and the fixing of prices. The comparative size of the defendant's capacity for output in relation to other powder manufacturers, and its influence as a factor in the trade generally, were known to him when he severed his connection and when he conceived and began to carry out his purpose of entering into such powder field as a competitor. The plaintiff does not occupy the same position as a competitor in existence during the period that this influence was being developed and who may have been, during the course of such development, as well as after it had reached the height of its power, injured in its business or property by reason thereof, but is here as one entering the competitive field when such growth and influence have been established. To it, this influence and power of the defendant, when it, the plaintiff, was launched into the powder field, is not in itself actionable, even though that status is due in part to methods which are prohibited by the Anti-Trust Act, and before the plaintiff can recover it must establish that the defendant used its power in the trade oppressively, not necessarily against the plaintiff alone; but at least in the conduct of its business generally; that is, that it used such methods as, backed by its influential position, tended to the suppression of open competition and to obstruct the free flow of commerce—the trade conditions sought to be secured and protected by the prohibitions of the Anti-Trust Act, and that it, the plaintiff, was injured by reason thereof."

6. In refusing to correct the error of the Dis-

trict Court in instructing the jury as follows, to wit:

"Mr. Waddell, as already stated, was well advised when he promoted the plaintiff company of the defendant's business, capacity and policies. He had been its agent for a long period during which several severe competitive struggles took place, and he knew the outcome thereof, and which was, generally speaking, the taking over in one form and another of such new comers, and at least in one instance—that of the Indiana at a considerable profit to the owners of that company.

"Of course, Mr. Waddell, or the company which he formed had a right to go into business, and the motive for entering into such business is of little moment so far as their rights were concerned; but if he was actuated by the belief that his company would meet with a like experience after some competitive struggles, it may have a bearing upon the question whether the plaintiff was sufficiently capitalized to engage in the struggle for the market already occupied. Of course, if you find that it was sufficiently capitalized, or that it had sufficient financial backing to weather a struggle carried on under normal or lawful competitive conditions, that is a sufficient answer, and it would make no difference whether it was or was not sufficiently capitalized to meet a competition forced upon it by unlawful means."

7. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

"No one who enters into a competitive field is guaranteed that he will get any particular share or even a share of the business at a profit, nor does the mere fact that the largest competitor is able to prevent a smaller one from getting a profitable share of the business make it liable

in damages to such other. Competition, as it exists under the laws at this date, has within it the element of fight. It permits fighting so long as it is fair and it permits the fair fighter to go away with the spoils, even though some one in that fight has been injured, and perhaps irretrievably injured in consequence; so that it is not the mere fact that a competitor suffers injury through severe competition that makes the other competitor who may have come out of the fray successfully, liable to compensate for the losses sustained by the injured party."

8. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

"There is no evidence whatever which would justify you in finding that the defendant hired detectives to track Mr. Waddell for the purpose of forestalling him in the purchase of a site, and to create opposition among the people to the location of plaintiff's plant in any place by instilling fear or otherwise, or by bidding up the price of any property plaintiff might have desired to acquire so as to prevent the entry of a competitor into the black powder business. The fact, however, that detectives were employed by the defendant to shadow Mr. Waddell after he had severed his connection with the defendant, and after his declaration to embark in a competitive business, is a circumstance to be considered by you in connection with the other testimony in the case upon the alternative questions whether it shows a hostile purpose upon the part of the defendant against Mr. Waddell's contemplated enterprise with the view of suppressing competition, or whether it was but a step taken by the defendant in the protection of its legitimate interests, namely, to prevent their employees from being taken from them by this prospective competitor, which latter is the explanation offered on behalf of the defendants."

Assignment of Errors 9-10

9. In refusing to correct the error of the District Court in refusing to receive in evidence a letter offered by the plaintiff, reading as follows:

"Chicago, Feb. 13, 1903.

H. A. Koach, Esq.,
c/o Stratford Hotel,
Cincinnati, Ohio:

Dear Sir—This will be handed to you by Capt. H. R. Saville of the Philadelphia Agency, who has been engaged in shadowing the party I wired to you about in cipher, as follows:

'Wire immediately if R. S. Waddell of Wilmington, Delaware, is now in Cincinnati; think can be found South East corner Third and Broadway. Want to place shadow; therefore, inquire carefully.'

and to which you replied as follows:

'Mail at party's office Union Trust Building indicates he will arrive tomorrow. He has home and family in this city.'

Will you kindly assist him as much as possible in locating the party, and just as soon as he locates him, he is to wire to Chicago for assistance.

Yours truly,

(Signed) J. H. Schumacher,
Sup't."

10. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

"There is no evidence to the effect that the defendants or any of them exercised any control at any time over the affairs of the Equitable Powder Company or the Austin Powder Company by virtue of any stock that they have held in those corporations, and therefore you must not

consider any claim to the effect that they had exercised such control."

11. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

> "There is no evidence showing that any of the defendants knew or had anything whatever to do with the purchase of the Buckeye Powder Plant and property by Mr. Olin and his associates, and therefore you must not consider the fact of such purchase as tending to establish any combination or conspiracy or other conduct prohibited by the Sherman Act."

12. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

> "There is no evidence, gentlemen, that would sustain the allegations made by the plaintiff, that * * * cash, intoxicating liquors, household goods and clothing were distributed among miners to secure their influence with their fellow workmen to effect boycotts, * * * or that it (the defendant) sold its product below actual cost; * * * and my instructions to you are, as to these particular allegations, that they have not been established, and you will therefore disregard them entirely in your further consideration of the issue here being tried."

13. In refusing to correct the error of the District Court in instructing the jury that at a test which was ordered by the Miners' Union to be made of the relative merits of the powder manufactured by plaintiff in error, and that manufactured by defendants in error at the mines of Applegate & Lewis at Hanna City, Illinois, "while this test was going on each of the powders had a paid

representative among the working miners, one acting in the interest of the plaintiff's powder, and the other in the interest of the defendant's."

14. In refusing to correct the error of the District Court in refusing to permit R. S. Waddell, a witness for the plaintiff, while on direct examination, to state what it was that caused him, as president of the plaintiff, to make an investigation for the purpose of ascertaining how it was that advices were received by him from persons to whom consignments of black blasting powder had been shipped from the shipment office of the Buckeye Powder Company—giving the definite car number of the car in which shipment was made and all the details of the shipment—before notice of that shipment had been received at the business office of that company.

15. In refusing to correct the error of the District Court in refusing to permit John G. Miller, a witness for the plaintiff, while on direct examination, to answer the following question—he having already been permitted to testify that he called the attention of the Burlington Railway Company officials to the situation relative to information concerning the shipments made by Buckeye Powder Company to its customers coming to him from sources other than the Buckeye Powder Company, and that said officials made an investigation:

"Q. Now, do you know what the result of that investigation was?"

16. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

Assignment of Error 16

"As to the charge that the defendant employed railroad employees to make telegraphic reports or other kind of reports of the plaintiff's shipments, and which information was used to get consignees to reject plaintiff's shipments, there is no proof that the defendant was able to have the consignments of plaintiff's powder cancelled by reason of any information obtained from railroad employees concerning such consignments, or that they ever succeeded in geeting such information from such employees, but there is evidence in the case that one named Piatt, who was an agent of the defendant, sought to hire Harry Paige, commercial agent of the C. B. & Q. Railway, to give him (Piatt) information concerning the shipments of the plaintiff's powder, offering to pay for such information at a named rate —$5.00 a letter, as I recall it. This was peremptorily refused by such agent, and as I recall it it is the only proof of any attempt to secure such information. This, of course, was a reprehensible act. What does such an act, in the light of all the circumstances surrounding it, and keeping in mind other facts in the case bearing upon the keen competition that took place between the defendant's and plaintiff's powders in that district, indicate? The plaintiff was a newcomer in a field already occupied. Except as to new business, it is inevitable that in order for the plaintiff to place its output it would draw some of the custom that theretofore had been flowing to the defendant or some other competitor. All of them had a right to compete for such business. None of them had the right, however, to use any but lawful methods. To retain one's own customers obtained by lawful means or to secure new ones is lawful, provided no unlawful means are used. The mere ascertaining to what person or place a competitor's product is being shipped is a legitimate means of keeping tab on the trade, and if a particular competitor has been making inroads upon the established trade of another, such other may properly

keep a surveillance over the conduct of such new competitor; but while this is lawful, it may be readily noted that an unlawful use of such information may be made."

17. In refusing to correct the error of the District Court in refusing to allow John G. Miller, a witness for plaintiff, while on direct examination, to answer the following questions—he having already been permitted to testify that he had endeavored to sell Buckeye Powder to certain persons whom he knew to be under contract to purchase powder from the Laflin & Rand Powder Company, and that he failed to sell to such persons, and that they gave him reasons why they did not or would not purchase powder of him:

"Q. State what those reasons were as given by them.

"Did any of those reasons which were given to you involve the question of these contracts which were in existence?

"Q. Did any of the reasons which were given to you by these parties or any of them involve the question of special prices that had been made to them by any other manufacturer of powder?"

18. In refusing to correct the error of the District Court in refusing to permit the plaintiff to read to the jury a certain letter written by Thomas Mackie to the Buckeye Powder Company, and dated at Kansas City, Mo., May 24, 1906, and reading as follows:

"Kansas City, Mo., May 24, 1906.

"Buckeye Powder Co.,
Peoria, Ill.:

"Gentlemen—we will soon be ready to enter into a contract for our powder requirements for

the ensuing year or for the next two or three years, and would be pleased to have you make us a proposition covering same.

"Kindly let us hear from you at your earliest convenience, and greatly oblige,

Yours truly,

Thomas Mackie,
Genl. Pur. Agt."

19. In refusing to correct the error of the District Court in refusing to permit the plaintiff to read to the jury a certain letter written by Thomas Mackie to the Buckeye Powder Company, and dated at Kansas City, Mo., August 15, 1906, and reading as follows:

"Kansas City, Mo., August 15, 1906.

"Mr. R. S. Waddell,
Prest. Buckeye Powder Co.,
Peoria, Ill.:

"Dear Sir—Referring to your letter of May 26th quoting prices on powder delivered at our various camps for the ensuing year, beg to state that this matter has just been determined and I regret to advise that you were not the successful bidders.

Yours truly,

Thomas Mackie,
Genl. Pur. Agent."

20. In refusing to correct the error of the District Court in refusing to permit the plaintiff to read to the jury a certain letter signed by the Waverly Coal & Mining Company, by J. W. Ferguson, President, and addressed to the Buckeye Powder Company, and dated at Kansas City, Kansas, February 17, 1906:

Assignment of Error 21

"Kansas City, Kansas, Feb. 17th, 1906.

"Buckeye Powder Co.,
Peoria, Ill.:

"Gentlemen—I wired you today cancelling car of CC Special Powder. I am somewhat tied up with the Du Pont Company and I am obliged to do this. If you have invoiced this car and it is shipped, or if you consider that the powder belongs to us, ship it at once and date your invoice Feb. 16th. Ship by as slow freight as you please, as I do not care for it before the 1st of March, or even the 10th of March. I say this because I do not wish to pay for it until say 90 days. If you are willing to do this, ship it as directed, but don't give me away to the Du Pont powder people.

"I will be clear of them in a few months. Wire me what you do. Saying you had shipped Feb. 16.

Respectfully,

Waverly Coal & Mining Co.,
by J. W. Ferguson, Pres."

21. In refusing to correct the error of the District Court in refusing to receive in evidence on behalf of the plaintiff certain letters written by J. H. Somers & Company to the Buckeye Powder Company, reading as follows, to wit:

"J. H. Somers & Co.
Cleveland, Sept. 10, 1904.

Buckeye Powder Co.,
Peoria, Ill.

Gentlemen:

Your Mr. R. S. Waddell was here the 5th and promised to send me some samples of your powder. One or two other large users of powder with their offices in this city have been in to see me in regard to your powder. I have asked them to defer their orders or any changes they would make until after these samples had ar-

rived and we had made a thorough investigation of your ability to turn out the kind of powder we require.

The samples Mr. Waddell had with him were beyond question in regard to quality, etc. Some of these other companies I speak of have no contract for powder, consequently you could start to doing business with them at once. It is a little different with us; we are tied up with a contract for the next few months but expect to make some change if we are not taken care of a little better than we have been.

Please forward these samples at once, and oblige,

Yours truly,
J. H. Somers & Co.,
Wm. D. Somers, Pur. Agt."

"J. H. Somers & Co.,
Cleveland, January 31, 1905.

Buckeye Powder Company,
Peoria, Ill.

Gentlemen:

"We have yours of the 28th inst., and in reply will state our present contract does not expire until March. It might be well for you to take this matter up with us at that time.

Your statement that your powder is 'excelled by none' must be correct, as we have heard several parties speak well of your product, and we have a set of your samples, which also speak well for themselves.

We use very little Single F powder. In Michigan we use only FF. Our three mines in this territory have used about 6,000 kegs of FF since October 1st. When Mr. Waddell was in Cleveland he stated your mill was either well supplied with F or FF, the writer does not remember which.

We have been informed that you have been very successful in your new enterprise, and we

are very glad you have met with this success, which, no doubt, is due you.

Yours very truly,
J. H. Somers & Co.,
Wm. D. Somers, Pur. Agt."

"J. H. Somers & Co.,
Cleveland, March 8, 1905.

The Buckeye Powder Company,
Peoria, Ill.

Gentlemen:

We have yours of the 3rd inst., with reference to furnishing powder for our Michigan properties, and note what you say in regard to Mr. Steven Corvin, as being our agent. You have failed to quote us prices on powder, and we would ask you to kindly take this matter up at once and give us your best price delivered St. Charles, Mich.

We have purchased 7,200 kegs of FF powder since October 1st for these properties and you can tell by these figures about how much we will use per year, especially as the coal business in this particular district last winter was not very good.

We might say in conclusion that we expect to buy powder a little cheaper this year than last, and this business no doubt will be yours if you quote the right price.

Yours very truly,
J. H. Somers & Co.,
Wm. D. Somers, Pur. Agt."

"J. H. Somers & Co.
Cleveland, March 25, 1905.

The Buckeye Powder Company,
Peoria, Ill.

Gentlemen:

We have yours of the 23rd inst. with reference to furnishing powder for our Michigan

mines. We are sorry to state that your price quoted several days ago did not meet favor, and as you said you can meet any price that is named we will wait until you make another quotation before we place this business.

We have a much better price than the one you have quoted and while we are very anxious to give our friend Mr. Corvin this business, yet we cannot see our way clear to pay a higher price for your powder than we would have to pay for the powder we have been using in the past.

Yours very truly,
J. H. Somers & Co.,
Wm. D. Somers, Pur. Agt."

"J. H. Somers & Co.
Cleveland, April 15, 1905.

The Buckeye Powder Company,
Peoria, Ill.

Gentlemen:

We are a little late in acknowledging receipt of your quotation of March 31st, however, we have been thinking the matter over and have been in constant correspondence with our superintendent at St. Charles in regard to the matter.

In your letter you state if any Powder Company made us a better price than 1.05 delivered they were entitled to the business. We have the better price all right—same being $1.02½, but we have not decided definitely in regard to the Michigan business. As we use a great deal of powder and have always been well taken care of, we want to know positively if we can get powder promptly after we have placed our order for the same. We have been signed up for some time for our powder in Ohio, and have included the Michigan properties in this contract in a way that we can purchase powder from the same company we purchase our Ohio powder, providing we do not give you the business.

We cannot give you any definite information on this matter until our superintendent has time to render his decision.

Yours very truly,
J. H. Somers & Co.,
Wm. D. Somers, Pur. Agt."

"J. H. Somers & Co.
Cleveland, Aug. 23, 1905.

Buckeye Powder Company,
Peoria, Ill.

Gentlemen:

We herewith enclose our order #1248 for one carload of FF blasting powder, price to be $1.02½ delivered as per your letter of Aug. 21st. You no doubt have been advised by Mr. Corvin that we are buying our powder for $1.00 per keg at the present time. We are willing to pay you 2½ per keg on this order as we are anxious to give your powder a trial.

Yours truly,
J. H. Somers Coal Co.,
Wm. D. Somers, Pur. Agt."

22. In refusing to correct the error of the District Court in refusing to admit the interlocutory decree and the final decree of the United States District Court for the District of Delaware, in the case of United States of America, petitioner, against E. I. du Pont de Nemours & Company, *et al.*, defendants.

23. In refusing to correct the error of the District Court in refusing to permit R. S. Waddell, a witness for plaintiff in error, while under redirect examination, to state what the information was which he gave to plaintiff's attorneys upon which the allegations set forth in paragraph 11 of the amended declaration were based—counsel for

defendants in error on cross-examination having already been permitted to read the said paragraph to the said witness, and thereupon to ask him whether he gave his attorneys the information upon which the said allegations were based, to which the said witness replied that he did and would be glad to state them to the jury.

24. In refusing to correct the error of the District Court in permitting Olive Taylor, a witness for the defendant, to testify as follows:

"Q. Now, Mrs. Taylor, in a suit instituted in the United States District Court for the District of New Jersey, by the Buckeye Powder Company against the E. I. du Pont de Nemours Powder Company and two other companies, known as the International Smokeless Powder and Chemical Company and the Eastern Dynamite Company, the Buckeye Powder Company, in answer to a demand for the names of customers of the Buckeye Powder Company induced by the defendants, or by the other persons or corporations I will name to you, the Buckeye Powder Company has given the name of Howarth and Taylor as one of the customers of the Buckeye Powder Company which was induced by these defendants and persons which I will name, to abandon the purchase of powder from the Buckeye Powder Company. The names of these persons are: Thomas Coleman du Pont, Pierre S. du Pont, Alexis I. du Pont, Alfred I. du Pont, Eugene du Pont, Eugene E. du Pont, Henry E. du Pont, Irene du Pont, Francis I. du Pont, Victor du Pont, Jr., Arthur J. Moxham, Hamilton M. Barksdale, Edmund G. Buckner, Frank L. Connable, Jonathan A. Haskell, and the following corporations: International Smokeless Powder and Chemical Company, E. I. du Pont de Nemours and Company, E. I. du Pont de Nemours and Company of Pennsylvania, du Pont International Powder Company, Delaware Secu-

rities Company, California Investment Company, Delaware Investment Company, Hazard Powder Company, Laflin & Rand Powder Company, Fairmont Powder Company, and Judson Dynamite and Powder Company. Will you now state whether or not any of the persons that I have mentioned here, or any of the corporations which I have mentioned in this question, or any agent or representative of those persons or corporations, ever induced you, as purchasing agent for your husband, Daniel Taylor, trading as Howarth & Taylor, not to purchase powder of the Buckeye Powder Company? A. No, sir."

25. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

"Plaintiff claims thirty cents a keg profit, but there is no evidence in the case that would justify the conclusion that that was a fair profit."

26. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

"In this case the statute of limitations pleaded by the defendant furnishes a line of demarkation between the two periods of the plaintiff's business. The 18th of September, 1905, fixes the dividing line and the plaintiff seeks to recover anticipated profits on the kegs of powder manufactured and sold for the three years since that date. The plaintiff claims that up to the 18th day of September, 1905, and covering a period of twenty-two months, it carried on its business profitably. The average profit per keg during such period, according to this claim, is 3 1/7 cents. This price per keg it figures from $6,470.61, which is the sum that the plaintiff claims its books show as the amount of the net profits made during the said twenty-two months and the

number of kegs upon which the 3 1/7 cents per keg profit is based is 205,931. What I said to you concerning those books as evidence when dealing with the alleged cost of the plant is applicable here. It is only in case you find that these books have been so kept that you can ascertain therefrom with certainty that a profit was made during this period, and the amount of such profit, that you can use that profit as a basis for a comparison upon the question of profits during the subsequent period. If you can not ascertain what were the actual profits by resorting to such books, of course, the inquiry as to profits at all fails for the lack of proof, and no allowance of profits can be made. If, on the contrary, however, it can be ascertained from such books with certainty that profits were made, and what was the amount of them, then the next question arises whether this period of twenty-two months was sufficiently long in view of the trade conditions prevailing, whatever may have been the cause thereof, to establish with reasonable certainty what the anticipated profits for the period subsequent to this 18th day of September, 1905, would have been if normal trade conditions had prevailed. Now, according to one contention, normal trade conditions did not obtain during this twenty-two months ending with the eighteenth day of September, 1905, while according to another contention that the conditions prevailing during that period, as well as during the period following, were normal; and that they were just such conditions as would be likely to follow the abandonment of the Trade Association, which you know finally was dissolved in June, 1904. Whether they be normal or abnormal, if it be a fact that during that period the plaintiff made profits, they furnish a sufficient basis for comparison with subsequent years for me to submit it to your consideration; but it will be for you to say whether as a fact that period was sufficiently long to furnish a basis for comparison with subsequent years. If you should

find that it isn't sufficient to furnish such a basis, even though you should have found that during the twenty-two months the plaintiff made a profit, the further inquiry as to profits during the remaining years must end, and no profits can be allowed. If, however, you find that it does furnish a satisfactory basis, then you will allow as profits upon the kegs manufactured during such subsequent period all or so much of such 3 1/7 cents per keg as you shall find was the profit per keg on the 224,683 kegs as is shown were made during the three years following September 18, 1905.

"The defendant challenges the correctness of the sum alleged to have been made as profits during the twenty-two months referred to, claiming that the items of salary paid to the Waddells, and the loss sustained in the explosions, one of which I considered a short time ago, when dealing with the question of the book value of the plant, should have been charged to the running or working expense during those twenty-two months, instead of to construction, and that if they had been this amount would have been totally wiped out. If that is the fact, of course, there is no standard here upon which you can calculate profit for the 224,683 kegs which were made and sold; but if you should find that only a part of such salaries and explosion losses, and which were charged to the construction account, should have been charged to running expense, and after deducting from this sum total, namely, $6,470.61, such amount so found, there remains a profit, that profit will furnish the standard; and when you have ascertained the price per keg such profit represents that will be the profit per keg, and not the 3 1/7 cents per keg that has been allowed as the anticipated profits upon the kegs actually sold."

27. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

Assignment of Error 28

"As the evidence does not furnish us with a legal basis upon which we can determine, as a matter of fact, that the plaintiff could have sold on a profitable basis any more powder than it actually sold, no allowance can be made for such unmade or unsold merchandise."

28. In refusing to correct the error of the District Court in instructing the jury as follows, to wit:

"So far I have been dealing with the value of the plant simply as a tangible or physical property. A manufacturing plant, however, may have another and additional value, namely, its good-will; and as the plaintiff claims that it has suffered damages to its good-will, that phase will now be considered. Good-will may be defined for present purposes as 'the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or from celebrity or reputation for skill, or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.' Establishment of a profitable business is the essential of the good-will. Where that does not exist there can be no good-will.

"The very contention of the plaintiff on another branch of the matter of damages is that from September 18, 1905, until the time that it ceased doing business, it was conducting an unprofitable business; and as the losses said to have been incurred during this period largely overcame the profits claimed to have been made for the twenty-two months preceding we have as the only basis for a good-will, not that a pecuniary advantage or benefit was secured by the plaintiff during the time it was in business, but

that it would have done so except for the wrongful acts of the defendant, and that for a part of such time it actually did make a profit.

"True, a person may be wrongfully prevented from acquiring a good-will; and ethically such a wrong is just as injurious as if an established good-will was injured by such wrong doing. The rule in allowing as well as estimating damages, however, is a practical, rather than an ethical standard, and this excludes all damages that are purely speculative and contingent. To attempt to create out of unknown quantities a good-will for the purpose of giving it a value when no past conditions establishing a good-will exist, would be but a pure speculation, and therefore not allowable. The claim of damages for good-will therefore must be disallowed."

29. In refusing to correct the error of the District Court in refusing to grant plaintiff in error a new trial, for the reasons and causes therefor shown as follows:

"1. Because the verdict in favor of the E. I. du Pont Nemours Powder Company, returned herein on the 25th day of February, 1914, is against the clear weight of the evidence.

"2. Because the verdict for the Eastern Dynamite Company and International Smokeless Powder and Chemical Company, returned herein on the 25th day of February, 1914, is against the clear weight of the evidence.

"3. Because said verdict rendered in favor of the E. I. du Pont Nemours Powder Company is against the law.

"4. Because said verdict in favor of the Eastern Dynamite Company and International Smokeless Powder and Chemical Company is against the law.

"5. Because the charge of the Court was erroneous in law.

"6. Because of the failure of the Court to instruct the jury on material issues in its charge to the jury.

Assignment of Error 29

"7. Because of the refusal of the Court to instruct the jury on material issues as requested by the plaintiff in its charge to the jury.

"8. Because the jury while deliberating upon their verdict had before them a large number of letters, files, pleadings, and other papers that were not in evidence in said case and which they examined and inspected contrary to law."

WHEREFORE, the plaintiff in error prays that said judgment may be reversed and the errors above stated be corrected and a new trial of the issues in this action be directed.

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Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 249.

THE BUCKEYE POWDER COMPANY (a corporation),
Plaintiff in Error,

AGAINST

E. I. DUPONT DE NEMOURS POWDER COMPANY (a corporation of New Jersey), EASTERN DYNAMITE COMPANY (a corporation of New Jersey) and INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY (a corporation of New Jersey),
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

General Statement.

This is an action brought under Section Seven of the Sherman Law to recover damages to the business or property of the plaintiff by reason of alleged offenses of the defendants against the provisions of Section Two of the Sherman Law.

The action was begun in September, 1911, under a declaration consisting of one count and containing volu-

minous charges against the defendants under the law referred to.

The defendants moved that the declaration be stricken out on the ground that it was bad for duplicity and was so irregular and defective as to prejudice the defendants in a fair trial. This motion was disposed of by Judge Rellstab in an exhaustive opinion, which appears in 196 Fed. 514, the result of which was that certain sections of the declaration were ordered to be stricken out and it was held that the declaration fairly construed did not embrace causes of action under both the first and second sections of the law, but under one of said sections only and therefore was not bad for duplicity. The Court further held that any indefiniteness in the declaration could be cured by a bill of particulars.

Thereupon, the declaration was amended as suggested by the Court and the defendants filed pleas of the general issue and also a special plea of the Statute of Limitations.

Thereafter, the defendants served upon the plaintiff a demand for a bill of particulars asking to be informed in reference to what illegal methods it was claimed had been employed by the defendants, or any of them, and particularly as to what customers of the plaintiff it was claimed the defendants, or any of them, had induced by illegal means to abandon the purchase of powder from the plaintiff. This demand for a bill of particulars called forth an answer, setting forth various alleged offenses and giving the names of over three hundred persons whom it was alleged, the defendants had induced to abandon the purchase of powder from the plaintiff corporation. The persons named in the bill of particulars as having been so manipulated by the defendants were scattered all through the middle west and it necessitated the taking on behalf of the defendants of many depositions to refute said allegations. This was done and depositions to the number of about one hundred and thirty were taken, all of which conclusively refuted the charges thus made by the plaintiff, many of which depositions have been printed in the record.

The case came on for trial before Judge Rellstab and a jury in the United States District Court at Trenton, on September 23rd, 1913, and ended in a verdict for the defendants on February 25th, 1914, the intervening period, with the exception of adjournments over week ends and some holidays, having been continuously occupied by presentation of evidence and argument in the case.

The jury returned a verdict of "no cause of action" in favor of all the defendants, being instructed by the Court to return such a verdict in favor of the Eastern Dynamite Company and the International Smokeless Powder and Chemical Company. A writ of error was taken to the District Court of the United States for the District of New Jersey from the United States Circuit Court of Appeals for the Third Circuit. The judgment for the defendants was affirmed in an opinion rendered by Circuit Judge McPherson (223 Fed. 881). The assignments of error under the present writ are all assignments of error made under the writ directed to the District Court for the District of New Jersey and were considered by the Circuit Court of Appeals. Some of the assignments of error made before the Circuit Court of Appeals are not made in this Court and counsel for the plaintiff have not considered in their brief assignment of error No. 29 which is presumably abandoned and will not be considered in this brief.

It is apparent that to recover in an action like this, the plaintiff must prove to the satisfaction of the jury by a fair preponderance of the evidence, two things:—First, that the defendants, or some of them, have been guilty of offenses against the Sherman Law in accordance with the allegations of the declaration, and Second, that thereby the plaintiff has been injured in its business or property in such a manner that the jury could find a specific sum equivalent to such damages.

The plaintiff in error maintained before the jury and now maintains to an extent in its brief that the defendant duPont Powder Company was guilty of various offenses against the Sherman Law.

Our object in discussing these propositions at all is to indicate that there was much evidence in the record on both sides of each proposition advanced by the plaintiff in error and that such evidence was submitted to the jury and all the questions in reference thereto were foreclosed by the verdict of the jury, or else the plaintiff in error succeeded in producing no evidence whatever in reference thereto.

It was claimed that detectives were placed on Mr. Waddell's track. There was some evidence to the effect that detectives were employed for two or three weeks. It was explained that the purpose was to determine whether or not Mr. Waddell was endeavoring to interfere with the employees of the defendants and entice them away. There certainly was a question of fact here raised as to the purpose of this operation and also as to its effect, and that question was decided by the jury.

Second—It was alleged that a Peoria Committee was appointed for the purpose of centralizing the fight against the plaintiff.

In this regard there is no evidence in the record.

Third—It was alleged that workmen in the mills of the defendants were notified that they would be put on a black list if they entered the employ of the plaintiff.

The only evidence in this regard is in the deposition of Ernest Hauser (Record, p. 355). Mr. Hauser testified that on one occasion the Superintendent of the Fontanet Mill of the defendants posted a notice to the effect that Mr. Waddell had declared himself an enemy of the duPont Company and any employee that obtained employment at the Buckeye Mill need not thereafter apply to any mill controlled by the duPont Company. He states that this notice was posted in the washroom of that plant by the Superintendent (p. 358).

This again raised various questions of facts. First, as to the correctness of Mr. Hauser's testimony, and second, the important question of whether it was a circumstance that in any way injured the plaintiff—a question, of course, passed upon by the jury. Mr. Hauser also testified that Mr. Waddell at the time was seeking to entice

employees of the Fontanet Mill away from duPont Company (Record, p. 356).

Fourth—It was claimed that after the Buckeye plant was located the defendant sent spies to ascertain its business secrets.

In this regard there is no evidence.

Fifth—It was claimed that agents of various transportation companies, particularly the C., B. & Q. R. R. Co., were sought to be employed to furnish information of the Buckeye shipments.

There is no evidence in the record in regard to the agents of any transportation lines except the railroad mentioned. There is some flimsy evidence in reference to an alleged interview between a man by the name of Piatt and a freight agent of that railroad by the name of Page, the result of which was that no arrangement was made. The whole evidence was of the most inconclusive character and bore such internal evidence of improbability that a question of fact immediately arose as to the reliability of this evidence, and, of course, the further fact appeared that of necessity the plaintiff could not have been injured by such an abortive attempt.

Sixth—It was claimed that a contract system was employed to tie up the trade in the district reached by the plaintiff for the purpose of forestalling it in its effort to secure business.

On this subject the record contains much evidence explaining in detail what contracts were made, how they were made, what their effect was and it conclusively appears that they were not confined to the district operated in by the plaintiff. There was much evidence to the effect that they were only incidents in the ordinary course of business and they had no injurious effect upon the plaintiff and that these contracts had been made long prior to the establishment of the plaintiff's business. This claim, of course, raised questions of fact as to the propriety of the contracts and as to their effect upon the plaintiff, questions entirely disposed of by the jury.

Seventh—Claims were made in reference to rebates on

these contracts and to special prices made to consumers.

The state of the record is similar to that in regard to the contracts, and all questions relating thereto were effectively disposed of by the jury.

Eighth—It was claimed that the defendant reduced its prices for powder solely with the view of preventing the plaintiff from obtaining a fair portion of the powder trade, and that the plaintiff was unable to offer powder at any price below which the defendant would not go.

There is no evidence to this effect in the record. There is voluminous evidence to the effect that the defendant reduced prices only to meet prices which had been made against it by the plaintiff and many other competitors; that these conditions were not confined to the territory occupied by the plaintiff, but were general throughout the country. This claim, of course, raises various questions of fact, which were likewise disposed of by the jury.

Ninth—There was a claim that sales were made at an actual loss.

There is no evidence in the record to this effect, but even if there were, it would raise questions of fact in regard to the propriety of the sales and their effect upon the plaintiff, which likewise would have been disposed of by the jury.

Tenth—There was a claim that powder was sold in districts where competition did not prevail for prices higher than in districts where it did prevail, and in some places at prices which enabled the defendant to make substantial, and sometimes excessive, profits.

In regard to the last proposition, there is no evidence in the record. It is true that prices varied in different sections of the country, but the variations were all explained by a number of witnesses, who maintained the propriety of such conditions. Whether there was any irregularity in this, and what the effect on the plaintiff was, were all questions of fact which were likewise disposed of by the jury.

Eleventh—It was claimed that the defendant employed

miners to stir up discontent among their fellow workmen to the prejudice of the plaintiff's powder.

In this regard there is no evidence in the record, and even if there were it would have raised questions of fact which would have been effectively disposed of by the jury.

We have made the above statement in regard to these alleged offenses for the purpose of showing that none of them can be here discussed as a ground for reversing this judgment, unless it can be established that some specific error was committed by the Court in the making of the record which led to the conclusion.

The brief of the plaintiff in error takes up under Point I (pp. 25 to 109 inclusive) a discussion of the direction of a verdict in favor of the defendants, Eastern Dynamite Company and International Smokeless Powder and Chemical Company, which is a matter that we will hereinafter discuss in its proper order, but under that heading of the brief there follows a more or less elaborate discussion of what the plaintiff calls a history of the explosive business in the United States, going back to remote periods and purporting to come down to the period in which the Buckeye Powder Company existed.

This long statement sets forth in detail what the plaintiff claims the record shows as to the illegality of the defendant's organization and various acts committed by it under the claim that these were offenses under the Sherman Law. There are many inaccuracies in this statement and it would seem to be sufficient for this purpose to point out the fact that whatever evidence appeared in this record tending to show offenses by the defendants, or any of them, against any provisions of the Sherman Law, the record also includes voluminous evidence introduced by the defendants to the effect that they were not guilty of any offenses against that statute and that no operations carried on by the defendants or any of them were of such a character as to have had any effect upon the plaintiff or its business operations. Hundreds

if not thousands, of pages of the record go to show that the misfortunes of the plaintiff were due, not to any attack by the defendants, not to any undue conditions in the trade for which the defendants were responsible, but on the contrary were due to lack of proper organization on the part of the plaintiff, lack of capital, lack of business experience, inattention to business, misrepresentations to customers, inability to fill orders, and furnishing bad powder. The record is full of evidence to the effect that the defendants in no wise interfered with any of the customers of the plaintiff, in no wise induced any of them to leave the plaintiff. Of the one hundred and thirty customers that were examined, not one testified that the defendants, or any of them, induced such customer to leave the plaintiff, but on the contrary, they all testified that they left for other and legitimate reasons, disconnected with anything except the failure of the plaintiff to satisfy them. The record is further full of testimony to the effect that during all the period of the existence of the plaintiff company a very large number of independent competitors sprang up with the consequent result of lower prices; that prices were decreased not by any action of the defendants, but by the action of these new concerns including the plaintiff, and in fact under the leadership of the plaintiff, which was one of the first to be established; that during the whole period instead of increasing its hold upon the trade and the volume of its trade, the defendant lost trade and the volume of its trade continually decreased.

In view of this state of the record, it immediately becomes immaterial as to what evidence the plaintiff can point to in the record as tending to establish the proposition that the defendants were guilty of any unlawful monopoly under the Sherman Law or attempt to monopolize the powder trade, because it is perfectly apparent that whether such monopoly existed or whether such attempt was made upon this record was a question of fact on which there certainly was voluminous evidence in favor of the defendants even though the plaintiff can

point to certain evidence that tended the other way. It is also true that whether or not such monopoly existed or such an attempt to monopolize existed, nevertheless there was no competent evidence or there at least was a great conflict of evidence on the question of whether any such alleged conditions, if they existed, resulted in any specific damage to the plaintiff, or whether, on the contrary, the plaintiff's misfortunes, such as they were, were not entirely accounted for by other and distinct and independent causes, evidence of which is to be found all through the record as made.

Therefore, we think it unnecessary to discuss in detail this alleged history of the powder industry, because, like the specific claims of offenses, heretofore discussed, the matter was entirely disposed of and conclusively foreclosed by the finding of the jury. The history, as detailed in the plaintiff's brief, can have no effect in this cause unless the plaintiff can point out that in making the record submitted to the jury, the Court below committed such a substantial error as to require a new trial of this action.

We, therefore, in briefing this case, will do nothing except to consider the specific assignments of error that go to the alleged errors of the Court in making the record.

In discussing these assignments of error, we will take them up in the order in which they appear in the formal assignment of errors.

Assignment of Error Number 3:

This assignment is based upon the following instruction of the court to the jury and the refusal of the court below to disapprove the instruction (Record, 3199):

> "The suit is brought by the Buckeye Powder Company and has proceeded to trial against three defendants. The evidence, however, fails to support any participation by the Eastern Dynamite Company and the International Smokeless Powder and Chemical Company, and my instructions to you are that you return a verdict of no cause of action in their favor."

In discussing this matter, Judge McPherson in the court below, stated (Transcript, 3186):

> "In our opinion, the direction to find a verdict in favor of the Dynamite Company and of the International Company was correct. Neither of these corporations manufactured or traded in black blasting powder—which was the particular business the defendants were charged with restraining or monopolizing—and their indirect connection with the alleged unlawful combination was rested almost wholly on the fact that a majority of the stock in each was owned or controlled by the duPont Company. Obviously, however, this fact alone did not prove their participation in a conspiracy, and as there was almost nothing else to support the allegation we need not take further time to discuss it. Moveover, only selected portions of the evidence are before us, and the district judge very properly called attention to this fact when he granted the exception now being considered, saying: 'In my judgment this exception to be considered should have behind it the entire record, but it is allowed and signed that the plaintiff may have the benefit of it in case I am in error in that view.'"

As heretofore pointed out, there were three defendants in this action, E. I. duPont de Nemours Powder Company, Eastern Dynamite Company and International Smokeless Powder and Chemical Company. The effect of the court's instruction was to eliminate the last two companies from the consideration of the jury and the assignment involves an inquiry as to whether there was anything in the record with reference to either of those companies that should have been submitted to the jury for its consideration. This assignment is briefed by the plaintiff in error at great length from pages 25 to 109 of its brief, in which discussion there is reviewed practically all the evidence in the case that was favorable to the plaintiff, disregarding anything that counteracted it, and drawing no distinction between those facts which affected the duPont Company on the one hand and the two corporations involved in this assignment on the other hand.

The question here is not whether there was any evidence that should be submitted to the jury in reference to attempts to monopolize, and damage to the plaintiff's business, as the discussion would seem to indicate, but is simply whether or not there is any evidence in the record on which any liability could be based as against either the Eastern Dynamite Company or the International Smokeless Powder and Chemical Company. It is submitted that there is no such evidence.

The plaintiff in error cites a number of cases on pages 33–37 of its brief, which go to the point that a conspirator may in some instances be liable for the acts of his co-conspirators. This proposition probably could not be successfully denied, nor is it necessary to deny it. The Court here did not hold that one conspirator is not liable under proper limitations for the acts of his co-conspirators, but held that there was no evidence that either of these corporations was a conspirator, and it was on that ground that the verdict was directed in their favor. The evidence never proceeded to the point where the rule that is laid down in the cases cited could have an application. In quoting from Judge McPherson's opinion in the Court below on page 37 of the brief of the plaintiff in error, that court is made to say that the connection of these two corporations with the alleged unlawful combination "was rested *wholly* on the fact that a majority of the stock in each was owned or controlled by the duPont Company". This is an incorrect quotation, because it omits the word "almost", the language used by Judge McPherson being that such charge was "rested almost wholly on the fact mentioned". (See record, p. 3186). This inaccuracy is probably not of consequence, as the record does not disclose anything besides such stock ownership which could be relied upon to establish such connection.

Inasmuch as the plaintiff in error has briefed the evidence in the manner above mentioned, it seems to be necessary to make the following comments upon what is shown by the record.

POINT I.

There are no facts shown by this record upon which any liability could be based as against the Eastern Dynamite Company or the International Smokeless Powder and Chemical Company.

To begin with, the amended declaration does not charge either of these defendants with having done any act to the injury of the plaintiff, or its business, nor does it recite any fact to show that either of these defendants was a participant in any conspiracy save the mere fact that the controlling interest in the stock of each of the corporations was owned by the duPont Powder Company.

After describing the three defendants and alleging that a large number of other corporations and individuals were co-conspirators with them, without stating any facts to justify that conclusion, the declaration states that certain efforts were made to monopolize the trade in powder and other explosives by various means mentioned in Paragraph Fourth of the declaration. The declaration then states that a large number of the corporations which are named were acquired by the defendant duPont Powder Company and were dissolved, and continues (Transcript, p. 7),

> "and thereupon the said E. I. duPont de Nemours Powder Company became possessed of a controlling interest in the capital stock of each of the following corporations, to wit: * * * The Eastern Dynamite Company * * * The International Smokeless Powder and Chemical Company. * * * *"

and the paragraph concludes with the statement that by reason of the premises the said defendants and others mentioned succeeded in creating practically a complete monopoly. The declaration then describes the organiza-

tion of the plaintiff corporation, the location of its plant, etc., and describes the great opportunities it had for doing profitable business.

Beginning with Paragraph Eighth (Transcript, p. 14), the amended declaration proceeds with a detailed discussion of a great number of oppressive acts alleged to have been committed by the defendant duPont Powder Company against the plaintiff, but nothing is said in these paragraphs in reference to anything done by either of the other two defendants. These allegations against the duPont Company were none of them proved and almost all of them had no evidence whatsoever to support them in the record. The amended declaration then ends up with a statement of the damages that have been occasioned to the plaintiff by the aforesaid transactions. It is true that in one or two places in the declaration as quoted on page 38 of the brief of the plaintiff in error, it is alleged that the defendants, including the two here involved, by means of the premises maintained a practically complete monopoly, etc., but there were no premises stated in the declaration on which to found such a conclusion.

It is, therefore, apparent that practically no charge against these two defendants is made in the declaration except that a controlling interest in their stock was owned by the duPont Powder Company.

It is important to understand the origin and the status of the Eastern Dynamite Company and the International Smokeless Powder & Chemical Company.

First, in regard to the Eastern Dynamite Company. The Du Pont Company and others ever since the beginning of the Nineteenth Century had been engaged in the manufacture of black blasting powder and rifle powder. Dynamite was invented in the latter part of the sixties and late in the seventies it began to be introduced as a commercial explosive.

The Atlantic Dynamite Company was a California corporation largely owned by people in California (Haskell, p. 1610). It had a plant at Kenville, New Jersey, for the manufacture of dynamite. The Repauno Chemical Com-

pany and the Hercules Powder Company were also engaged in the east in the dynamite business, each having a plant in the State of New Jersey. The stockholders in each concern were identical, being the Laflin & Rand Powder Company, the Hazard Powder Company, and E. I. duPont de Nemours & Company, together with certain individuals. These stockholders had been connected with those companies from their inception and had practically been partners in the organization of the two corporations. These same stockholders also had certain interests in said Atlantic Dynamite Company (Haskell, pp. 1756–1758); P. S. duPont, pp. 111–112). In other words, the Laflin & Rand Powder Company, the Hazard Powder Company and the duPont Company were jointly pioneers in the introduction and development of the dynamite business in the United States.

In 1895 certain dissensions arose among the directors of the California corporation, the Atlantic Dynamite Company. Its practical managers were in the east. One of them, a Mr. Schrader, being the General Manager and Agent, attended to the operation of the works and the sale of the product. A Mr. Moore was also largely interested in the company and occupied a position of equal importance to that of Mr. Schrader. These two gentlemen differed so much in regard to matters of policy that considerable friction arose between them. Whereupon, the directors of the Atlantic Dynamite Company, who were located in California, found that it was impossible to reconcile the differences between these two gentlemen, and being so far from the scene of the practical operations of the company, they determined it would be best to turn over the management of the business to the eastern stockholders, being the same ones who were stockholders in the said Repauno Chemical Company and the Hercules Powder Company (Haskell, pp. 1758–1759).

The only practical way to accomplish this object was by the formation of a new corporation which would control the business of the three corporations mentioned. Thereupon this defendant the Eastern Dynamite Com-

pany was formed with a capital stock of Two million dollars. $1,400,000. of it was given to the stockholders of the Repauno Chemical Company and the Hercules Powder Company in exchange for their stock in those concerns. The other $600,000. of the stock was given to the Atlantic Dynamite Company in exchange for its physical assets and that company was wound up. Consequently, in the formation of the Eastern Dynamite Company and in the acquisition of the stock of the Repauno Chemical Company and the Hercules Powder Company and the property of the Atlantic Dynamite Company there was no change in the beneficial ownership except in reference to the property of the Atlantic Dynamite Company and a proportionate interest in the new concern, the Eastern Dynamite Company, was preserved in the stockholders of the Atlantic Dynamite Company (Haskell, pp. 1759–1760).

Such was the origin of the Eastern Dynamite Company. It and its subsidiary companies engaged entirely in the manufacture and sale of dynamite, a business wholly distinct from that of black blasting powder and smokeless powder, enterprises in which the Eastern Dynamite Company was never in any way interested. Furthermore, the formation of the Eastern Dynamite Company was brought about at the instance of the western stockholders of the Atlantic Dynamite Company (Haskell, p. 1760). Later the Eastern Dynamite Company acquired the property of quite a number of dynamite companies that had sprung up in the meantime (Haskell, p. 1761). The only interest of the defendant duPont Powder Company and its predecessors in this business was through its stock ownership, first, in the three corporations mentioned, and later in the Eastern Dynamite Company. The duPont Powder Company and its predecessors had owned the stock of the Hazard Powder Company since the early seventies, and in 1902, upon the acquisition of the Laflin & Rand Powder Company, there came also into their possession such stock interests in the Eastern Dynamite Company as were owned by the Laflin & Rand Powder Company. Therefore, the defendant duPont

Powder Company was a stockholder and continued to be a stockholder controlling the Eastern Dynamite Company during all the periods complained of in this action, the situation being as described in the amended declaration, page 7, to the effect that the defendant duPont Powder Company became possessed of the controlling interest in the capital stock of said Eastern Dynamite Company.

The above is the basis of Judge Rellstab's charge to the jury that almost the entire connection of the Eastern Dynamite Company with the transactions complained of is the fact that its stock was controlled by the defendant duPont Powder Company.

In the next place, in reference to the International Smokeless Powder & Chemical Company: There seems to be very little in the record in regard to this company. It appears that previous to 1903 it was manufacturing Smokeless Powder as was also E. I. duPont de Nemours & Company (p. 94). The duPont International Company acquired a controlling interest in its stock (p. 95).) The defendant duPont Powder Company acquired a controlling interest in the duPont International Powder Company in 1903 and retained the control until 1908 (p. 96). This company was engaged exclusively in the manufacture of military powder. The defendant duPont Powder Company owned no stock in the defendant International Smokeless Powder & Chemical Company, but the majority of its stock was owned by said duPont International Company, which in turn was controlled by said duPont Powder Company. There are a large number of outstanding stockholders of the defendant International Smokeless Powder & Chemical Company (P. S. duPont, p. 114).

The statement at page 86 of the brief of the plaintiff in error to the effect that the International Smokeless Powder & Chemical Company was organized by the new management is entirely incorrect, and there is no evidence in the record to support it.

From the above statement it will appear that these two defendants, the Eastern Dynamite Company and the

International Smokeless Powder & Chemical Company, are separate corporations, their only relationship to the duPont Powder Company being that the latter owns the stock of the Eastern Dynamite Company and through the duPont International Company owns not all, but a controlling interest, in the stock of the International Smokeless Powder & Chemical Company. This connection alone, of course, does not make either of those corporations a co-conspirator in the matters complained of in this action, as was very properly held by the District Court with the approval of the Circuit Court of Appeals.

It remains to determine whether any other facts appear in the record which connect either of these corporations with the matters complained of in such a way as to show that a verdict should not have been directed in their favor. It is submitted that there is nothing whatever in the record that indicates such a connection.

(a) *The Gun Powder Trade Association.*

In the discussion of this assignment of error, the plaintiff in error in its brief from page 37 to 109 has seen fit to discuss the history of the powder industry and particularly the history of the Gun Powder Trade Association with the evident purpose of indicating that the Eastern Dynamite Company or the International Smokeless Powder & Chemical Company had something to do with that association or with other matters subsidiary thereto that are discussed in the brief. Such is not the fact. Neither of these defendant corporations was ever in any wise involved in the Gun Powder Trade Association or its operations.

There was an association organized some time in the seventies between a number of corporations and partnerships engaged in the business of the manufacture and sale of black blasting powder and rifle powder, a business in which neither the Eastern Dynamite Company nor the International Smokeless Powder & Chemical Company was ever engaged. This association attempted

in various ways to apportion the trade and fix prices and had a varying career under different agreements until its final dissolution in 1904. Its history, operations and results are exploited in this record at great length The brief of the plaintiff in error contains everything in reference to it that is favorable to the plaintiff in error. This proof was met by more proof on the part of the defendants to the effect that the association did not result in any monopoly of the powder industry and did not result in damage to the plaintiff. All of this portion of the record was submitted to the jury as against the duPont Powder Company, whose predecessors were members of the association, and the jury, after considering it all, brought in no cause of action against that defendant.

The record can be searched in vain for a disclosure of any participation by either of the other two defendants in the association or its operations.

An examination of the Fundamental Agreement of 1889 and the General Understanding of 1896 will show that those agreements are entirely between companies manufacturing black blasting powder and sporting or rifle powder. The former agreement is printed at page 42 of the record. The latter agreement does not seem to be printed in the record, but is referred to by M. Haskell on page 1623 of the record. These are the agreements governing the Association and its operations.

The companies that were parties to the agreement of 1889 are recited on page 46 of the brief of plaintiff in error and neither the Eastern Dynamite Company nor the International Smokeless Powder and Chemical Company is among them and could not have been, because neither was in existence nor is any dynamite company among them. The same is true of the agreement of 1896 and the same is true of this Association down to its final dissolution in 1904. Furthermore, the terms of the agreements themselves show that they had to do exclusively with black blasting powder, products not dealt in by either of the defendants now being discussed. The agreement of 1889 (Transcript, p. 2637) confines its operation to "gun

powder for blasting or sporting purposes or both", and goes on at length to regulate matters in reference to the sale of such commodities.

The references to the agreement of 1896 by Mr. Haskell, above mentioned, occur in the course of his discussion of the black blasting powder business and has nothing to do with dynamite. Voluminous minutes of the meetings of the Association and extracts therefrom were introduced in evidence (Transcript, pp. 2821-2889), and an examination of them will show that they relate to nothing except black blasting powder and sporting powder. Nowhere do they relate to dynamite or high explosives.

It is not our purpose to discuss the details, the operations or the results of this Association in reply to the very long argument of the plaintiff in error found on pages 37 to 109 of its brief, for the reason that all of those considerations had to do with the defendant duPont Powder Company and were submitted at great length and in detail to the jury by Judge Rellstab and the jury disposed of them by its verdict in favor of that defendant. Our only object at the present time is to point out that the two defendants, the Eastern Dynamite Company, and the International Smokeless Powder and Chemical Company, had nothing to do with this Association and its operations.

At pages 77 to 81 the plaintiff in error argues that the Eastern Dynamite Company co-operated with the Gun Powder Trade Association because it was one of the Wilmington High Explosives Companies that bought powder. The minutes of the Trade Association referred to long ante-date any period involved in this litigation. Mr. Waddell testified that this condition prevailed while he was agent for the Hazard and duPont Companies in Cincinnati, which was prior to 1902. He states that the Gunpowder Trade Association, through a special committee made special prices to the Wilmington High Explosives Companies when he was acting on that special committee. If this is true, it is entirely without significance, because it simply means that some of the high explosives companies were buying black powder from mem-

bers of the Gunpowder Trade Association. This does not indicate that the high explosives companies were parties to any conspiracy, but, if anything, that they were the victims of the operations of that Association, if those operations were illegal. They were buying powder according to the rules of the Association. It is difficult to see how this circumstance in any wise makes them a party to any monopoly or attempt to monopolize.

No mention of the Eastern Dynamite Company will be found in this testimony, nor in the minutes of the Gunpowder Trade Association in reference to this matter. The discussion in the brief of the plaintiff in error from page 87 in reference to the advisory committee of the Trade Association, the fixing of lower prices on specific cases and in competitive districts, the Brewster report, the ninety-five cent price, advancing prices after each contest, tying up trade by a system of contracts, the contract system in its operation in the district reached by the plaintiff, the special price system, so called. trading and exchanging contract customers, and the rule of equities respecting contract trade, the legal effect of the contract system employed by the defendants, all found in the brief of the plaintiff in error from pages 87 to 109, relate exclusively to the black powder companies in the Gunpowder Trade Association, and have nothing whatsoever to do with the dynamite business or the Eastern Dynamite Company or the International Smokeless Powder and Chemical Company, nor can anything be pointed out in the record which shows that they have anything to do with those companies.

On page 98 of the brief, Mr. Barksdale's testimony is quoted from page 1915 of the record with the evident intent of showing that the kind of a contract system that the plaintiff was complaining of with reference to the black powder business also prevailed in the dynamite business. This is not the fact. The plaintiff's complaint in regard to the contract system was that all the independent black powder manufacturers dictated and authorized these contracts to be made by its respective members.

There being no Association among the dynamite interests, no such thing was possible. Mr. Barksdale's testimony as quoted in the brief does not indicate any such thing. It is simply to the effect that the same method of contracting for either dynamite or black powder that prevailed previously continued to prevail after the defendant duPont Powder Company was organized. This does not indicate that the sysnem of contracts in each industry was the same. That it was not so is explained later by Mr. Barksdale in his testimony at pages 1924–5 and 6, which testimony is not mentioned by the plaintiff in error and which shows that all Mr. Barksdale referred to was that the dynamite companies prior to the organization of the duPont Company did make contracts for the furnishing of dynamite and continued to do so after that date.

(b) *Specific contracts referred to in the brief of the plaintiff in error.*

Mixed up with the discussion in regard to the Gunpowder Trade Association is a discussion of certain specific contracts that had nothing to do with that Association, evidently interjected for the purpose of confounding the dynamite industry with that Association. The so-called "Foreign Agreement" is discussed at page 50 of that brief. The following agreements are also mentioned at the pages referred to:

Haskell-Fay Agreement of 1895097 (Brief, p. 68).
King Powder Company Agreement of 1897 (Brief, p. 71).
Mexican Agreement of 1898 (Brief, p. 73).
Hancock Chemical Company Agreement of 1898 (Brief, p. 74).
Sullivan-Fay Agreement of 1904 (Brief, p. 75).

The Foreign Agreement is not in evidence. The only matters relating to its terms are found in the testimony of Mr. Haskell (Transcript, p. 1665 *et seq.*). He gives his recollection as to a few terms of the agreement, but it is

entirely indefinite. There was nothing in it in reference to the fixing of prices, and it seems to have related to a division of territory, and to have been to the effect that the European factories would not build plants or sell certain products in the United States, and a reciprocal provision was contained. It does not oven appear whether or not the agreement applied to dynamite, except as it may be inferred from the fact that the Eastern Dynamite Company was a party to the agreement and dealt in that commodity. Mr. Haskell specifically says (Transcript, p. 1662):

> "I am not at all clear whether that was universal; whether it applied to all classes of goods or not."

The detail of what was provided in this agreement that is contained on pages 51 and 52 of the brief of the plaintiff in error is most axaggerated. This agreement was abrogated in 1906, at large expense to the duPont Company (Transcript, p. 214). It is difficult to see how the plaintiff could have been harmed by an agreement which resulted in keeping a lot of foreign companies from manufacturing and selling black power in the the United States.

Mr. Haskell testified at page 1777 of the Record:

> "Q. In your opinion, would a plant or plants built in the United States, for instance in the vicinity of Peoria, have been an aid to the Buckeye Powder Company if they had been built by this foreign concern?
>
> A. They would have added further competion where more than enough already existed."

It is further to be noted that this agreement was abrogated prior to the time that the plaintiff herein was entitled to collect damages on account of injuries it could succeed in showing it had been subjected to.

The plaintiff in error has interjected a discussion of this agreement at page 50 of the brief in the midst of a discussion of the Gunpowder Trade Association. The agree-

ment was not made by that Association, although some members of that Association signed it, and its discussion has no part in the operations of that Association.

In reference to the Haskell-Fay agreements of 1895 and 1897. The Eastern Dynamite Company was in no wise a party to the first agreement. It is printed at page 2784 of the record and was prior to the organization of the Eastern Dynamite Company. The interests, however, that were consolidated into the Eastern Dynamite Company were involved in the agreement. In 1899 a supplemental agreement was entered into to which Mr. Haskell was a party and he represented the Eastern Dynamite Company. This is printed at page 2792 of the Record. Both these agreements were abrogated long before the plaintiff went into business and had to do entirely with the dynamite business. That the organization of the duPont Company, which took in the stock of the Eastern Dynamite Company, was a successor to these agreements can in no wise be claimed, because the duPont Powder Company did not acquire the company that was represented by Mr. Fay, to wit, the Ætna Powder Company, whereas, it did acquire the companies that were represented in the Gunpowder Trade Ascociation. This fact alone is sufficient to eliminate these agreements from consideration herein.

The entire theory underlying the charge that the defendant duPont Powder Company was a combination or monopoly, both as presented in this case and as discussed by Judge Lanning in the Government case, was that it brought together in itself the ownership of various corporations which previously had been members of the Gun Powder Trade Association, and thereby made that association no longer necessary.

It is therefore apparent that the mere fact that the Eastern Dynamite Company had an old contract with the Ætna Powder Company, which company was not acquired by the duPont interests, is immaterial as showing any conspiracy or attempt to monopolize on the part of the Eastern Dynamite Company and the duPont Powder

Company. The Ætna Powder Company is not even charged in the declaration as being in the combination or a co-conspirator.

The Eastern Dynamite Company made an agreement on December 31st, 1897, with the Ætna Powder Company and the King Powder Company. Herein it is likewise true that the duPont Company did not acquire either the Ætna Powder Company or the King Powder Company. This agreement is printed on page 2796 of the record and is an agreement that the King Powder Company, which desired to become more actively engaged in the dynamite business, should sell only such high explosives as were manufactured by the Eastern Dynamite Company and the Ætna Powder Company. Instead of being an agreement to foster a monopoly, it would seem to be an agreement to encourage the King Powder Company to go into the dynamite business. This agreement lasted until May, 1901, when the King Powder Company retired from the dynamite business by virtue of an agreement dated May 1st, 1901 (Record, p. 2800). It will, therefore, appear that these contracts were done away with long before the plaintiff came into existence and could not have had any effect upon it. Later the King Powder Company sold a trade-mark it owned to the Eastern Dynamite Company and the Ætna Powder Company (Record, p. 2801).

The Mexican Agreement related to trade in Mexico, and had nothing whatever to do with the black powder business, or any attempted monopoly therein. It is printed at page 2805 of the record and was abrogated long before the matters complained of in this suit.

The Hancock Chemical Company agreement was dated October 11, 1898 (Record, p. 2784). The Eastern Dynamite Company was a party to this agreement, whereby it agreed to act as selling agent for all the dynamite produced by the Hancock Chemical Company. This agreement was also abrogated long before the matters complained of in this suit.

The Eastern Dynamite Company was not a party to the

Sullivan-Fay agreement of 1904 referred to in the brief of the plaintiff in error (p. 75).

It, therefore, appears that although the Eastern Dynamite Company was a party to certain specified agreements they all related to the dynamite business and were abrogated before the period of the plaintiff's existence and could in no wise be a part of any attempt to monopolize the black powder business, or if they had been a part they had been done away with before the matters involved in this suit occurred. In the next place, the defendant duPont Company was not a party to any of these agreements. Consequently, the Eastern Dynamite Company and the duPont Company were not jointly interested in any one of them. No predecessor of the defendant duPont Powder Company was a party to any of them except the Foreign Agreement. It is not even pretended that the International Smokeless Powder and Chemical Company had anything to do with any of these agreements.

(c) *Mis-statements in the brief of the plaintiff in error in regard to this matter.*

There are certain glaring mis-statements in the brief of the plaintiff in error that we desire to call to the Court's attention.

On page 55 it is stated that in 1902 when the Laflin & Rand Powder Company was purchased that company was a large stockholder in certain companies "all of which were at that time members of the Gunpowder Trade Association". Among such companies catalogued as being members of that Association is the Eastern Dynamite Company. That corporation as heretofore shown had never had anything to do with that Association.

On page 65 it is stated that the Eastern Dynamite Company co-operated with the Gunpowder Trade Association by becoming a party to the Foreign Agreement. It has been shown that that agreement had nothing to do with the Association.

On page 66 the brief states that Mr. Haskell in 1895

wrote a certain letter to Mr. Miller "immediately after he brought the dynamite interests into the Association". To begin with, it was not until 1902 that Mr. Haskell's interests were purchased by the duPont Company, and, in the next place, they were not brought into the Association at any time.

We, therefore, come back to the point at which we started, which is that the only connection with this case that exists so far as these two defendants are concerned, is that the duPont Company owned a controlling interest in their stock.

No corporate action on the part of either company can be pointed out that in any wise relates to any conspiracy or attempt to monopolize the black powder business, or any other business, so far as that goes, and it is submitted that the ruling of the court was correct.

POINT II.

This assignment of error cannot be considered in the absence of the whole record.

In granting this exception, Judge Rellstab made the following comment (Record, p. 2518).

> "In my judgment, this exception to be considered, should have behind it the entire record, but it is allowed and signed, that the plaintiff may have the benefit of it in case I am in error in that view."

Judge McPherson in the Circuit Court of Appeals made the following statement (Record, p. 3186):

> "Moreover, only selected portions of the evidence are before us, and the district judge very properly called attention to this fact when he granted the exception now being considered, say-

ing 'In my judgment this exception to be considered should have behind it the entire record, but it is allowed and signed that the plaintiff may have the benefit of it in case I am in error in that view.'"

It would seem to be apparent that the whole record should be considered in determining a question of this sort. Large portions of the record are omitted in the bill of exceptions. This is evident from Judge Rellstab's statement. The presumption is that the District Court was right in its ruling and that the omitted portions of the record would so indicate in case there were anything in the record that is brought up which indicates the contrary. To obviate the effect of this consideration, the plaintiff in error in its brief from pages 25 to 31 presents an elaborate argument to the effect that the bill of exceptions is an agreed statement of facts in this case. Unfortunately, the counsel for the defendants have been unable to agree upon any proposition with the counsel for the plaintiff from the beginning of the litigation. If this bill of exceptions were an agreed statement of facts that statement includes of course the proposition that the whole record is not here, a statement included in the bill of exceptions. That the bill of exceptions is an agreed statement of fact, however, is not correct. This bill of exceptions was granted in the ordinary course. A proposed bill of exceptions was prepared by the plaintiff in error and served on the defendants in error; they duly objected to various portions of the proposed bill of exceptions on account of its manifest inaccuracies and after various conferences and a reference to Mr. Chevrier as a friend of the Court to pass on certain of the objections and a final hearing before the court upon notice, the bill of exceptions was allowed by the Court. There was nothing in the proceedings either suggesting or resulting in an agreement that the facts stated were correct or that they were all the facts in the case.

The above proposition is supplemented by the state-

ment that if the record is deficient in this regard the defendants should have applied for a writ of *certiorari* to send up the missing portion of the record. We are not aware that any burden rests upon the defendant in error to so complete a bill of exceptions that certain exceptions taken by the plaintiff in error will be considered by the Court. We have trouble enough in pointing out the erroneous contentions of the plaintiff in error without taking the burden of perfecting his case for him. As the matter stands, it appears conclusively that only a part of the record is here, and this alone is sufficient to defeat this assignment of error.

POINT III.

If an error was committed in directing a verdict in favor of the Eastern Dynamite Company and the International Smokeless Powder and Chemical Company, that error was harmless.

There is not a thing in this record to indicate that either of these corporations did anything to the injury of the plaintiff in error. If either was to be held at all, it would be only by virtue of the legal proposition that having joined a conspiracy, such company was responsible for the acts of the co-conspirators. Inasmuch as the only alleged co-conspirator who did any of the things that were charged to have injured the plaintiff in its business is the duPont Company, and everything that was done by that company was submitted to the jury with the result that it was completely exonerated, it is difficult to see what harm was done the plaintiff, even if as a matter of law an error was committed in dismissing the case so far as these corporations were concerned. To all intents and pur-

poses these two corporations stand in the position of two sureties sued in connection with the principal for whom they are sureties. In such a case, even if the two sureties should be dismissed from the proceeding erroneously, no harm would be done unless a verdict was rendered against the principal. Here, if the duPont Company did nothing that rendered it liable to the plaintiff in error, certainly these other two corporations could not be held on the ground that they were co-conspirators of the duPont Company.

We desire to take this occasion to extend our acknowledgments to the counsel for the plaintiff in error for having called to our attention the case of *Portland Gold Mining Co.* vs. *Stratton's Independence* (158 Fed. 63), which is cited in its brief under another point.

The case was decided by the Circuit Court of Appeals for the Eighth Circuit, with a very interesting opinion by Mr. Justice Vandevanter.

The suit was brought against Stratton's Independence, Ltd., an English corporation, J. W. Price, T. B. Burbridge and others to recover damages for trespass to real property, the claim being that the defendants had mined ore on the plaintiff's property and disposed of it. The plaintiff and Stratton's Independence owned adjoining mining properties. Stratton's Independence leased certain privileges to Burbridge to take out ore from its mine. The ore when mined was to be sold by Stratton's Independence. Burbridge made some working agreement with Price, whereby the latter became interested in the operation.

It appeared that if any trespass had been committed, it had been committed by Burbridge and Price and that the operation was not participated in by Stratton's Independence, but the latter was claimed to be responsible, for the reason that it took the ore thus mined and sold it. It, therefore, appears that the only claim against Stratton's Independence would be based upon and derived through a liability on the part of Burbridge and Price.

The case went to trial and the Court directed a verdict

in favor of Stratton's Independence. The case then proceeded and resulted in a judgment in favor of Price and Burbridge, whereupon the plaintiff took the case to the Circuit Court of Appeals on exception to the ruling directing a verdict in favor of Stratton's Independence.

A situation more similar to the one in the case at bar could scarcely be presented.

The Court held that it was unnecessary to examine the record to see whether the direction of a verdict in favor of Stratton's Independence was justified or not, for the reason that it was at most a harmless error, inasmuch as judgment went in favor of the other two defendants. Any liability on the part of Stratton's Independence of necessity being based upon the fact that Burbridge and Price had committed a trespass, and it appearing by the result of the action that the latter had not committed a trespass, it became entirely immaterial what the Court did with Stratton's Independence. Many authorities are cited by the Court, all of which seem to be pertinent and uphold the contention.

Applying this principle to the case at bar we here have a situation in which it is neither alleged in the declaration, nor was it claimed at the trial, that either of these corporations did anything whatsoever to the plaintiff or its business. It is sought to hold them by virtue of the legal proposition that they may be liable in law for something that was done by the other defendant. Inasmuch as the verdict of the jury shows that those things were not done by that other defendant, the question of whether or not the direction of the verdict in favor of these two defendants was proper becomes an academic one, and if an error was committed it becomes a harmless one.

The above case is specifically approved by this Court in *Bigelow* v. *Old Dominion Copper Co.* (225 U. S. 111). At page 128 this Court, among other things, says:

> "The unilateral character of the estoppel of an adjudication in such cases is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another when that other has been exonerated in a direct suit."

Assignment of Error No. 4:

This assignment of error is based upon an order made by the trial Court requiring the plaintiff to make an election as to whether the plaintiff under its declaration would rely upon proof of acts declared to be unlawful by Section 1 of the Sherman Act or those declared to be unlawful by Section 2 of said Act.

The bill of exceptions on page 2433 contains the following:

> "Thereafter, upon the conclusion of the opening statement to the jury by plaintiff's counsel the defendant's counsel moved the Court to require the plaintiff to make an election as to whether the plaintiff under his declaration would rely upon the first or second section of the Act of Congress of July 2nd, 1890, commonly known as the Sherman Act, in seeking a recovery, and after argument said motion was sustained.
>
> To which ruling of the Court the plaintiff by its counsel then and there excepted and said exception was allowed."

In allowing said exception the trial Judge made the following statement:

> "In my judgment, this exception to be considered, should have behind it the entire record, but it is allowed and signed, that the plaintiff may have the benefit of it in case I am in error in that view.
>
> JOHN RELLSTAB,
> Judge."
>
> (Record, p. 2433).

POINT I.

The first point we make is that the specific statement by the trial Court is to the effect that the bill of exceptions is deficient in that it does not contain portions of the record which in the judgment of the trial Court are

essential to a consideration of this assignment of error. What those portions of the record are does not appear, but it does not lie in the mouth of the counsel for the plaintiff in error to state that they are not pertinent, the trial Court having stated unequivocally that there are things in the record that bear upon this subject which have not been embodied in the bill of exceptions.

We submit that this alone is a sufficient ground for refusal of this Court to consider said assignment. We also submit that the position of the trial Court to the effect that an assignment of error of this sort cannot be considered in the absence of the entire record, is a correct position.

It is apparent that in order to have any substance, the assignment on behalf of the plaintiff must be based upon the proposition that his declaration does contain allegations of offenses under both the first and second sections of the Sherman Law and further does claim damages for violation of each of those sections. If this is not the condition of the declaration, of course, in no event would the plaintiff have the right to claim the privilege of going to the jury under both sections of the law.

Without discussing the question at the present time as to whether the declaration is so framed or not, it is apparent that all the evidence in the case should be embodied in the bill of exceptions in order to determine whether or not there was any proof offered which would justify the claim of the plaintiff that there is evidence in the record showing violations of both sections of the Act. It will not do to point out episodes in this evidence, which, by themselves, might indicate some violations of each section of the Act, in the absence of the whole record, because it is apparent that the portions of the record that are omitted may well have done away entirely with the effect of any evidence that the plaintiff can now point out which he has embodied in his bill of exceptions which would indicate a violation of either section of the Act. Consequently, from a fragmentary bill of exceptions of this sort it may well be that there are indications of

some violations of each section, whereas, upon a complete record the Court would not have been justified in submitting the case to the jury based upon violations of the first section. Under these circumstances, certainly the plaintiff cannot be heard to argue that an error was committed.

It is also apparent that before an error can be made the subject of a reversal of the judgment it must appear that it was a harmful error. Without the entire record, including all of the evidence, it is impossible to say that the refusal of the Court to allow the plaintiff to go to the jury under the first section of the Act injured the plaintiff in any way. The missing parts of the record might well be such as to show, even if there were offenses against the first section of the Sherman Law, that no damages had been sustained thereby.

POINT II.

The position of the plaintiff on this assignment of error is anomalous. It is well settled that the offenses described in the first section of the Sherman Law and those described in the second section of that law are different and distinct. It has been so held repeatedly by the Supreme Court of the United States; it was so held by Judge Rellstab in this case, and in his opinion passing upon this declaration, which is published in 196 Fed. 514, page 517, he states:

> "The first section of this act denounces restraint of interstate trade in two ways—by contract and by a combination or conspiracy—and in the second section the monopolizing and attempt to monopolize any of such trade is denounced. To maintain an action under this act, therefore, the plaintiff must allege as well as prove that the defendant committed one of such forbidden acts, and that in consequence he was injured in his business or property."

This clearly shows that the acts forbidden by the two sections are separate and distinct offenses. Many other cases might be cited to this end.

It is therefore apparent that the plaintiff is basing his contention at this stage of the proceedings upon the proposition that his declaration is bad. He is maintaining that his declaration consisting of only one count, does, as a matter of fact, contain two causes of action, and that he ought to have been allowed to avail himself of both those causes of action before the jury. In other words, he is forced to the position, not only that his declaration is the subject of duplicity, but that it is properly so, and he can take advantage of the duplicity that is therein contained. Otherwise, of course, there would be no allegations in the declaration that would support his claim that he should have been allowed to go to the jury on both sections of the law. It is an anomalous position to try to construe the declaration in such a manner as to make it bad for the purpose of being allowed to take advantage of those defects in the declaration to try two causes of action under one count. It follows that if there is any substance in this assignment of error, the declaration should have been stricken out as being bad for duplicity. This, again, we submit, is a sufficient answer to this assignment of error.

POINT III.

The position of the plaintiff in error being that his declaration is subject to duplicity and properly so, and that he can so consider it and take advantage of it, leads to a consideration of a few well defined holdings to the effect that if a declaration is subject to duplicity it is perfectly proper for the Court at the trial, upon motion, to order the pleader to elect as to which cause of action as stated in his count he will rely upon.

In the case of *Clancy* vs. *St Louis Transit Co.*, decided

in 1905 by the Supreme Court of Missouri, 91 S. W. Rep., page 509, the plaintiff joined in one count a cause of action for common law negligence and one based upon the violation of a city ordinance and another on willful negligence. Discussing this matter the Court states, page 516:

> "The petition originally stated three different kinds of negligence in the same count, to wit, common-law negligence, ordinance negligence and willfulness, recklessness, or wantonness, commonly called the 'humanitarian doctrine'. The defendant treated the petition as stating only two kinds of negligence, to wit, common-law negligence and ordinance negligence, and accordingly moved to require the plaintiff to elect on which he would stand. The court overruled that motion. That was error."

The Court further cites the case of *McHugh* v. *St. Louis Transit Co.*, 88 S. W. Rep. 853, and quotes from that case as follows:

> "In case a petition improperly joins two different causes of action in the same count, it has always been ruled by this court that the remedy is by timely motion to require the plaintiff to elect upon which count he will proceed to trial, as was done in this case."

In *Giacomo* v. *N. Y., N. H. & H. R. R. Co.*, decided by the Supreme Judicial Court of Massachusetts in 1907 (81 N. E. Rep. 899) a declaration contained two counts in each of which had been pleaded a cause of action at common law and also one under a statute.

In reference to these counts, the Court stated:

> "By the rejection of some of the sentences as surplusage, each count could stand as a count under the statute; on the other hand, by a similar rejection of other sentences each count could stand as at common law. It was simply a question of what should be rejected as surplusage. It is manifest that only one cause of action could be stated

in one count. What the plaintiff desired was that there should be two causes of action in one count—one under the statute and one at common law. Under the circumstances, the Court rightly ordered the plaintiff to elect what he meant by the counts."

The Court held that this order was perfectly proper.

It will be observed that the situation in this case is exactly the situation in this declaration. Here by eliminating certain statements as surplusage, there would be left a count under the second section, and likewise, by a rejection of certain other statements as surplusage, there might be left a count under the first section of the Act. Certainly the plaintiff cannot complain of having been given the privilege of extricating himself from bad pleading by taking his choice as to which interpretation he would put upon his own count.

POINT IV.

Beyond the reasons above given as to why there is no substance in this assignment of error, we further submit that it is the law of this case that this declaration states a cause of action under only one section of the Sherman Law.

As originally filed, the declaration contained a number of sections which do not now appear in it and also contained the names of a large number of corporations and individuals as defendants, who do not now appear in it as such defendants. The declaration was of such a character that it called forth a motion on behalf of the defendants to strike it out upon several grounds, but principally that it was subject to the charge of duplicity and that the declaration was so defective as to prejudice the defendants in obtaining a fair trial.

This motion was argued at length before Judge Rellstab and very carefully considered by him in an opin-

ion reported in 196 Fed. Rep., page 514, a perusal of which will show that Judge Rellstab, himself, had many misgivings in regard to this declaration. He ordered certain sections to be stricken out and he ordered the missing defendants to be eliminated, but he upheld the declaration.

It is unnecessary to discuss that portion of his opinion which deals with the claim made by the defendants that the declaration was so indefinite as to prejudice them in a fair trial, but the other ground urged by the defendants at that time was that the declaration was subject to the charge of duplicity in that it not only counted in one count upon offenses under both sections of the Sherman Law, but also upon offenses not governed by the Sherman Law at all. To uphold his declaration the plaintiff's attorney strenuously maintained that it counted only on a single cause of action, a position in which he was upheld, said cause of action being upon the second section of the law, as we understand it, the Court holding that all the statements in the declaration in reference to combinations and conspiracies were there either as matters of introduction and inducements or as statements of matters which led up to the monopoly or attempt to monopolize that is prohibited by the second section of the Sherman Law. The result is that the Court maintained the plaintiff's declaration at the plaintiff's insistence upon the very ground that it stated nothing but a cause of action under the second section of the Sherman Law.

To this ruling of the Court, the plaintiff took no exception, and we, therefore, submit that whether or not this declaration is susceptible of an interpretation as containing statements of causes of action under both sections of the law, nevertheless it is the law of this case that it states a cause of action only under the second section.

Despite the fact that the plaintiff maintained its declaration by this position at that time, a result which would not have occurred had he admitted that the declaration counted on both sections of the Sherman Law, he now

claims that it does so count on both sections and that he should be allowed to take advantage of the fact, which, if it existed, would clearly have resulted in striking out his whole declaration, because, in considering the matter, Judge Rellstab stated (p. 517):

> "If in so doing the pleader has combined two or more distinct causes of action, the pleading is bad for duplicity (*Rice* v. *Standard Oil Co.*, *supra*)."

It is, therefore, apparent that the plaintiff is endeavoring to take advantage at different stages of this proceeding of positions in reference to his declaration that are entirely inconsistent with each other. We submit that the declaration, as a matter of fact, does count only on the second section of the Sherman Law. Whether it does or not, we further submit that in view of Judge Rellstab's ruling on the preceding motion, it is the law of the case that it only counts on that section. Under these circumstadces, we fail fo see what ground of complaint the plaintiff has growing out of the fact that he was allowed to take his choice as to whether it should be considered a count under the first or second section of the act. In giving him that privilege, we submit that the Court was giving him a privilege to which he was not entitled; that the situation was such that he should not have been given an election, but should have been instructed that his declaration was under the second section of the law exclusively, and that, therefore, nothing could be considered under the first section. Because the plaintiff was given too much, he certainly cannot ask to have this judgment reversed thereby. That the plaintiff elected to go to the jury under the second section of the law, is a good indication of what his understanding was as to what the gravamen of his declaration consisted in. He elected to proceed under the second section, and we submit that he was in no wise harmed.

POINT V.

We furthermore submit that even if there was substance in this assignment of error, the plaintiff did not take the proper course to avail himself of the alleged error. The evidence had been taken—certainly there was no error unless the evidence was such as to support a cause of action under each section. If the evidence was in that shape, it having been put in during the course of many months, under circumstances where no one could well claim surprise, or that the facts had not been adequately developed, and the plaintiff felt himself aggrieved by the action of the Court in confining him to one section, his remedy was not an exception to that action of the Court but was to move for leave to amend his declaration to conform to his proof and insert therein another count founded upon the first section of the act. We are inclined to think that if such a motion had been made it might have been granted by the Court. However this may be, the motion was not made, and thereby we claim that the plaintiff, if there is any substance in his contention, failed to take the measures to protect his rights which he should have taken.

This view of the proper course to be taken by the plaintiff was upheld by the Circuit Court of Appeals. Judge McPherson, at page 3187, said:

> "But in any event we do not see how the ruling could have done harm; if the declaration did not support alternative charges, and if such charges were regarded as important to the case, the easy remedy by amendment was at hand. It is not surprising, however, that the plaintiff did not ask to amend; for we cannot conceive it possible that any one could doubt, at the end of this five months' trial, that the plaintiff's case depended for success upon the truth of the charge (to which practically all the evidence was directed) that the defendants had unlawfully attempted to monopolize a large part of the trade in black powder. The case was

certainly tried on the merits, and the ruling complained of was harmless, even if it were formally erroneous."

The plaintiff now contends that the motion to require the plaintiff to elect was made as the final act after the case had been argued to the jury (Plaintiff's Brief, p. 140). This is not the fact. It was made after the opening argument of the plaintiff. Then followed the defendants' arguments to the jury taking over five days and the closing argument for the plaintiff which took some four days. If the counsel for the plaintiff had thought it material to have two counts, there was ample time to make the amendment. The fact is that the plaintiff's counsel had all along contended that the declaration only set forth offenses under the second section, so that when put to an election plaintiff was consistent with its prior position in electing to rely upon the second section. The present position is only taken to extricate the plaintiff from the situation the verdict of the jury left it in.

POINT VI.

Lastly, we submit that the action of a trial Court in a matter of this sort involves nothing but a matter of discretion, and that, therefore, it is not the subject of review in this Court.

People v. *Briggs* (114 N. Y. 57).

In this case the complaint contained a count which was founded upon two different causes of action. The defendants moved for a direction either that the plaintiff separate his allegations and put in two counts, or, that he should be required to elect upon which one of the causes of action he would rely. The Court disposed of these ques-

tions, but they were made the subject of an appeal to the Court of Appeals, which Court stated (p. 66):

> "Whatever reasons may have been urged for or against the direction asked for, the most that can well be claimed on the part of the defendants is that such motions then made were addressed to the discretion of the Trial Court (*Roberts* v. *Leslie*, 14 J. & S. 76). This is not reviewable here."

The plaintiff endeavors to escape the situation in which it finds itself by maintaining that a cause of action for damages under the Sherman Law is based entirely upon Section Seven of that statute. That, therefore, in any one count any number of offenses can be relied upon, whether they are under one or both of the first two sections of that act, and it is stated that to consider each separate act as constituting a cause of action would make it necessary to formulate a separate count for every separate overt act or step in a conspiracy as a separate cause of action. This position is entirely untenable and no such claim is made by the defendants. We admit that many overt acts may tend to a combination or a conspiracy, likewise many and distinct overt acts may tend to an attempt to monopolize or a monopoly, and, of course, where the offense charged is a combination or conspiracy or monopoly or an attempt to monopolize, in any count that relies upon any one of those offenses, any number of overt acts tending to the consummation of that offense may be relied upon in one count, but to say that the pleader can rely upon all those different offenses in one count is an entirely different and an entirely unsound proposition.

We have already cited cases to the effect that an action for negligence cannot rely upon negligence in general, negligence due to a breach of an ordinance and other kinds of negligence. The situation is exactly similar. The fact that this cause of action is given by a statute does not differentiate it in a matter of pleading from a cause of action that is given by the general principles of the law. The

plaintiff's brief cites only two cases that seem to require discussion. They are the cases of the *Monarch Tobacco Works* v. *American Tobacco Co.* (165 Fed. 774) and the *People's Tobacco Co.* v. *American Tobacco Co.* (170 Fed. 396), (Plaintiff's brief, pages 136–137).

In the first case the question did not arise. It is true that the Court states in the course of its opinion that the petition which was framed under the Kentucky Code, so far as the form of pleading goes, averred that the defendants had conspired to restrain trade and also had attempted to monopolize trade. No motion or demurrer was filed upon the ground of this duplicity, but it appeared that the petition charged certain defendants with doing some certain things and other defendants with doing other things, and the motion was to separate the defendants or cause the pleader to elect as to whether he would proceed against one set of defendants or the other set of defendants, not because there were two causes of action stated, but because the respective defendants did not have to do with the same parts of what was evidently considered by all parties to be one cause of action. The case was in the District Court and the District Judge held merely because one defendant was charged with doing one thing and another with another thing, all tending to the same end, no reason was presented why they should be separated in the proceeding. This case, therefore, in no wise carries out the contention that is made for it in plaintiff's brief.

In the second case (170 Fed. 396), the lower court held that no cause of action was sustained. The Circuit Court in reviewing this decision merely held that the District Court had erred. While as a matter of fact the petition did recite offenses both under the first section and the second section, the attention of the Court was in no wise drawn to the question of whether any duplicity existed in this pleading, and, therefore, did not pass upon this phase of the case. It is also to be remarked that the question of duplicity is one which, of course, can be waived by the adverse party, if he so desires. It is, therefore, true that

this case in no wise sustains the contention made for it in the plaintiff's brief.

These two cases, however, are valuable authorities on other points that are relied upon by the defendants. The last case plainly holds that offenses under the first section and the second section of the Sherman law are entirely distinct offenses. The case first referred to also clearly holds, which we understand to be the law, that questions of pleading in this class of actions are to be governed by the law of the State in which the trial is held. Consequently, this question is to be referred to the law of the State of New Jersey. What the law there is on the subject is conclusively settled by the case of *Rice* v. *Standard Oil Co.* (134 Fed. 464) and also by Judge Rellstab in his decision heretofore referred to in 196 Fed., page 514.

In the case of *Rice* vs. *Standard Oil Co*., Judge Lanning considered a declaration under the Seventh Section of the Sherman Law, which contained one count and did not rely upon both the first and second sections of the Act but relied only upon the first. The declaration, however, did reply upon the fact that the defendants had been guilty both of unlawful contracts and combinations or conspiracies under the first section. Judge Lanning held that there was a distinction between the contracts and combinations or conspiracies under that section and that the declaration combining two or more of these distinct offenses was bad for duplicity. He stated (p. 466):

> "In one count there may be a charge of an unlawful contract, and in another a charge of an unlawful combination or conspiracy, but two unlawful things cannot be declared upon as synonymous terms and changed in a single count."

This decision goes much further than we contend for in this case. Here the pleader claims to have the right to count upon offenses under both sections of the law, to say nothing of failing to make any distinction between the various offenses prohibited by each sections taken separately.

The Circuit Court of Appeals in its opinion held that this assignment could not be reviewed satisfactorily without the whole record.

Counsel for plaintiff in this brief apparently conceding the correctness of the view of the trial and appellate courts in this position now contend that the incompleteness of the record is the fault of the defendants, and that the defendants should have applied for a writ of *certiorari* to bring up the balance of the record so that the plaintiff can avail itself of this assignment. We know of no authority which places the burden on the defendants in error to place before the appellate court a record which will enable the plaintiff in error to have considered by the appellate court the assignments of error it alleges. The furnishing of such a record is the duty of the plaintiff in error.

Assignment of Error No. 5:

This assignment of error is based upon the instruction to the jury as given by the trial Court as follows:

> "This suit is unique in many respects. The plaintiff, as a corporation and as a competitor in the powder business, is due to the efforts of R. S. Waddell, its chief witness in the suit. He organized it shortly after he separated himself from his employment with the defendant with which and its predecessors he had been identified for about twenty years. His services, while in the employment of the duPont interests, brought him in touch with their business policies and operations in the vending of powder. He knew of the existence of the trade associations and of such of the restraints and limitations put upon its members as related to the apportionment of the trade and the fixing of prices. The comparative size of the defendant's capacity for output in relation to other powder manufacturers, and its influence as a factor in the trade generally, were known to him when he severed his connection and when he conceived and began to carry out his purpose of entering into such powder field as a competitior. The plaintiff

does not occupy the same position as a competitor in existence during the period that this influence was being developed and who may have been, during the course of such development, as well as after it had reached the height of its power, injured in its business or property by reason thereof, but is here as one entering the competitive field when such growth and influence have been established. To it, this influence and power of the defendant, when it, the plaintiff, was launched into the powder fields, is not in itself actionable, even though that status is due in part to methods which are prohibited by the Anti-Trust Act, and before the plaintiff can recover it must establish that the defendant used its power in the trade oppressively, not necessarily against the plaintiff alone, but at least in the conduct of its business generally; that is, that it used such methods as, backed by its influential position, tended to the suppression of open competition and to obstruct the free flow of commerce—the trade conditions sought to be secured and protected by the prohibitions of the Anti-Trust Act, and that it, the plaintiff, was injured by reason thereof."

This portion of the charge of the trial Court is most vigorously attacked in the plaintiff's brief in this Court as it likewise was in the brief submitted to the Circuit Court of Appeals. On page 146 of the plaintiff's brief it is stated that a correct analysis of its real meaning and effect is as follows:—

> "It is tantamount to saying that monopoly needs but to obtain a foothold, and thereafter competitors must enter the field at their peril. It was a virtual direction of a verdict for the defendants, because it was equivalent to saying that long-continued violation of the law may ripen into privilege and may become a vested right. It is a most dangerous doctrine that monopoly can gain the right to perpetuate itself by prescription; that one who may venture into the field occupied by it must do so at his peril, and, if he does so with knowledge of its existence, can claim no protection from its unlawful methods."

Judge McPherson correctly criticised this analysis in his opinion in this case when he said:—

"It is almost needless to say that the instructions of the learned judge carry no such meaning, and could have had no such effect. After a preliminary statement outlining the previous history of the powder trade, he told the jury distinctly that:

'The defendant (the duPont Powder Company) therefore, at the time of the organization of the plaintiff company, * * * and during the entire time the plaintiff carried on its business, was acting in violation of the Anti-Trust Act as attempting to monopolize the trade in powder, which subjected it to be dissolved as such by direct attack on the part of the United States Government'.

"He added, however, the qualification that was called for by the nature of the case on trial:

'The fact that the status of the defendant was such, however, that, under a direct attack by the government, it would be dissolved as an unlawful combination in restraint of trade and an attempt to monopolize, would not alone make it liable in an action for damages. Such a suit can be maintained only for injuries sustained by reason of such attempted monopolization, so that, in a suit for damages, the defendant is entitled to more defenses than would be available in a suit brought by the government for dissolution, and the plaintiff in such a suit has more to prove than is necessary to obtain a decree in the government suit. It becomes important, therefore, to inquire into the relationship which the defendant bore to the powder trade generally at the time when the plaintiff asserts its promoter first declared his intent to engage in the powder business, and its subsequent relationship toward such trade generally, and to the plaintiff in particular, during the years 1903 to 1908, within which period the plaintiff claims it was being injured by reason of the acts of the defendant, and which it alleges were unlawful and within the operation of the Anti-Trust Act, as attempts to monopolize the powder trade.'

"He then summarized the following paragraph, repeating that the mere fact that the defendant

owed much of its growth and power in the trade to unlawful acts in the past, and that it continued to enjoy the fruits of some of such unlawful acts, did not make it liable in damages."

Then follows immediately the passage attacked, which is the subject of this assignment. The Court continues:

> "We confess our inability to see anything objectionable in this language. It states nothing but indisputable facts." * * *

We feel that it is perhaps unnecessary to add anything to what Judge McPherson has said, but we submit that the statement complained of is perfectly sound. It is, of course, true that the plaintiff would have occupied a very different position if it had existed for a long period prior to its organization and while the defendant was increasing in size and business. In that event, if there had been anything illegal in that increase on the part of the defendant, which had injured the plaintiff during that period, the plaintiff would be entitled to recover. Not having been in existence during that period, however, of course it is in a position different from one that had been in existence. The following part of the charge makes it perfectly plain what the Court meant. The Court goes on to state that the influence and power of the defendant which existed when the plaintiff entered the field, even if it were true that such position was due in part to methods prohibited by the law, nevertheless, before the plaintiff could recover it must also prove the other fact necessary to its cause of action, that is, that such position and power had been used to the detriment of the plaintiff and had caused it damage. This is simply a statement that to recover the plaintiff must show not only the offense against the statute but also the damage which it has caused the plaintiff.

Assignment of Error No. 6:

This assignment is found on page 3201 of the record.

It is based upon the proposition that the following portion of the instruction of the Court to the jury was erroneous:

> " Mr. Waddell, as already stated, was well advised when he promoted the plaintiff company of the defendant's business capacity and policies. He had been its agent for a long period during which several severe competitive struggles took place, and he knew the outcome thereof, and which was, generally speaking, the taking over in one form and another of such new comers, and at least in one instance—that of the Indiana at a considerable profit to the owners of that company.
>
> Of course, Mr. Waddell, or the company which he formed had a right to go into business, and the motive for entering into such business is of little moment so far as their rights were concerned; but if he was actuated by the belief that his company would meet with a like experience after some competitive struggles, it may have a bearing upon the question whether the plaintiff was sufficiently capitalized to engage in the struggle for the market already occupied. Of course, if you find that it was sufficiently capitalized, or that it had sufficient financial backing to weather a struggle carried on under normal or lawful competitive conditions, that is a sufficient answer, and it would make no difference whether it was or was not sufficiently capitalized to meet a competition forced upon it by unlawful means."

The above portion of the Court's charge will be found on page 2493 of the record.

In the lower court the plaintiff in error discussed this assignment, together with another portion of the charge which is the subject of Assignment No. 5 (Record, p. 3199), although the two extracts from the charge had no connection with each other and are taken from portions of

the charge that deal with entirely different subjects. This consideration is pointed out by Judge McPherson in his opinion in the court below (Record, p. 3192), and after quoting the instruction complained of in full the Court stated (Record, p. 3193):

> "Certainly, as we think, no sound criticism can be made of these passages either taken singly or placed side by side, and we shall make no further comment upon them."

We submit that the court below disposed of this assignment of error correctly. In the first place, no exception was taken to this portion of the charge. The exceptions that were taken to the charge will be found from pages 2518–2523 of the record, and among these exceptions there is none that specifies this portion of the charge as being objectionable. This fact alone is sufficient to prevent the plaintiff-in-error from now urging this assignment.

Rule 10 of the Third Circuit provides as follows:

> "But the party excepting shall be required to state distinctly the several matters of law in such a charge to which he excepts and those matters of law, and those only, shall be inserted in the bill of exception and allowed by the Court."

The reason for this rule and of the decisions below cited is that if the Court's attention is called to the specific error alleged to have occurred in the charge, an opportunity is thereby afforded the Court to reconsider the matter and correct the charge if erroneous.

Connecticut Life Ins. Co. v. *Union Trust Co.*, 112 U. S. 250;
Wabash Door Co. v. *Lewis*, 184 Fed. 260;
Louisville & N. R. R. v. *Womack*, 173 Fed. 752;
Block v. *Darling*, 140 U. S. 234.

Many other authorities might be cited, but the above would seem to be sufficient.

In the next place, the charge as given was perfectly

sound. The Court had discussed at great length the allegations of the complaint in reference to the alleged illegal conduct of defendants, together with the evidence which appeared in the record to support and refute those charges. Form page 2434 to page 2491 of the record the court gave its attention to those phases of the case and then (Record, fol. 7473) stated that if such facts failed to prove that the defendant was guilty of an attempt to monopolize the powder trade, the verdict must be for the defendant, but if, on the other hand, such an attempt had been proved, then there arose the question of whether the plaintiff had thereby been injured in its business or property by such illegal acts of the defendant. It was in the discussion of the elements of such damage that the court used the language that is complained of in this assignment of error. The defendant claimed that the plaintiff's misfortunes were not due to illegal acts of the defendant, but, on the contrary, were due to the plaintiff's lack of proper capitalization and equipment, its failure to produce satisfactory powder, and other causes. The Court stated to the jury that it was necessary that the evidence in regard to these claims of the defendant be considered (Record, fol. 7474). As the first item of these claims, the Court discussed the one to the effect that the plaintiff's plant was not properly equipped and the plaintiff company was not properly capitalized (Record, pp. 2492 and 3). It is in the course of this discussion that the language complained of was used. It is simply to the effect that Mr. Waddell was well posted as to the defendant's business capacity and policies on account of his long service with the defendant company; that he knew of the methods of competition of the defendant company. It is then stated that Mr. Waddell and the plaintiff company had a right to go into the powder business and that his motives therefor were of no consequence, but that if he believed his company would meet a similar competitive struggle, it might have a bearing on the question of whether his company was sufficiently capitalized. The Court then stated that if the jury found that it was sufficiently capitalized, of

course, that was the end of such contention, and, on the other hand, that if the competition which the plaintiff was forced to meet was unlawful, then it would make no difference whether it was sufficiently capitalized or not.

It is difficult to see what fault the plaintiff in error can justly find with this language. It simply points out the particular bearing of the evidence referred to in case competition was normal and legal, but the jury is plainly told in the last few lines of the extract quoted that if the competition was unlawful, then even that bearing was immaterial. In other words, if the plaintiff had made out the first part of the case, then this contention of the defendant had no bearing whatsoever.

We believe that instead of prejudicing the plaintiff in error, this portion of the charge was very favorable to it, much more so than the record fairly warrants. Instead of giving to Mr. Waddell's motives and the evidence in the record concerning those motives, the full scope to which the defendants claimed they were entitled, that is, instead of instructing the jury that if such were Mr. Waddell's motives it might account for the very bad condition of his plant and the poor quality of powder that was made therein, the Court directed the jury that its only effect would be that therefrom some inference might be drawn to the effect that he had been unable to raise or was not provided with the amount of capital he should have had to make his enterprise successful. This not only negatives the meaning attached to the charge by the plaintiff, but confines the legitimate evidence in the record within limits much narrower than we believe the defendants were entitled to.

Even after making the above statement, the Court pointed out that the question of capital, as well as other questions, was a question of fact to be determined by the jury, and if they found that the plaintiff was sufficiently capitalized to engage in a competitive struggle, not of the character induced by abnormal and illegal operations, but one existing under legitimate business conditions, then no inference whatever adverse to the plaintiff could be drawn from the evidence we have been discussing.

Assignment of Error No. 7:

This assigment of error is based upon an exception to the charge of the trial Court. This assignment embodies a quotation from the charge as given, which is substantially to the following effect:

That no one who enters into a competitive field is guaranteed that he will get any particular share, or even a share, of the business at a profit, nor does the mere fact that the largest competitor is able to prevent a smaller one from getting a profitable share of the business make it liable in damages to such other; that competition as it exists under the laws at this date, has within it the element of fight. It permits fighting so long as it is fair and it permits the fair fighter to go away with the spoils, even though some in that fight have been injured and perhaps irretrievably injured in consequence. So that it is not the mere fact that the competitor suffers injury through severe competition that makes the other competitor who may have come out of the fray successfully liable to compensate for the losses sustained by the injured party.

We are unable to see anything in this portion of the charge that is not entirely sound and very well expressed.

The exception that was taken by the plaintiff, however, is not broad enough to involve all of the charge quoted in this assignment of error, said exception being in the following language:

> "We also except to that portion of your Honor's charge which relates to the definition of competition and refers to it as being in the nature of a fight" (p. 2518).

When this exception was taken the Court made the following remark:

> "I did not define competition. I said that it had in it the element of fight" (Record, p. 2519).

It therefore appears that the only exception the plaintiff in error has is to the statement of the Court to the jury that competition as it exists under the laws of this date has within it the element of fight.

We do not see how anybody can successfully contend that the statement is not absolutely true.

The discussion of this assignment of error by plaintiff's counsel is found on pages 169 to 175. It appears to contend that a softer expression than "fight" should have been used. It certainly cannot be reversible error to have used so good an English word as "fight" when it so aptly describes legitimate competitive conditions.

Assignment of Error No. 8:

This assignment is found on page 3203 of the Record. It is based upon the instruction of the Court to the jury, as follows:

> "There is no evidence whatever which would justify you in finding that the defendant hired detectives to track Mr. Waddell for the purpose of forestalling him in the purchase of a site, and to create opposition among the people to the location of plaintiff's plant in any place by instilling fear or otherwise, or by bidding up the price of any property plaintiff might have desired to acquire so as to prevent the entry of a competitor into the black powder business. The fact, however, that detectives were employed by the defendant to shadow Mr. Waddell after he had severed his connection with the defendant, and after his declaration to embark in competitive business, is a circumstance to be considered by you in connection with the other testimony in the case upon the alternative questions whether it shows a hostile purpose upon the part of the defendant against Mr. Waddell's contemplated enterprise with the view of suppressing, or whether it was but a step taken by the defendant in the protection of its legitimate interests, namely, to prevent their employees from being taken from them by this prospective competitor which latter is the explanation offered on behalf of the defendants."

Here again we point out that among the exceptions taken to the Court's charge to the jury (Record, pp. 2518, 2523), there is no exception to this portion of the charge and, therefore, it cannot now be considered. In the next place, the charge is perfectly correct. The amended declaration (Record, p. 10) alleges that the defendant having failed to dissuade Mr. Waddell from entering into the powder business, formed a plan to prevent him from doing so and with this end in view placed detectives on his track to shadow him throughout the United States while he was looking for a location, to keep them advised of his movements and "to enable them through their emissaries to forestall him in obtaining a location of plaintiff's plant in such place as might be decided upon, by instilling fear into the minds of the people thereabouts", and further, if need be, by competing for the purchase of sites and bidding up the price, not with any purpose of making use of the same, but to prevent the entrance of an independent competitor into the business and with a view of preventing the plaintiff from finding a site, whereby Waddell was compelled to travel in secrecy and under assumed names.

All that appears in the record in reference to detectives is that detectives were employed by the defendant for a few weeks.

Mr. A. J. Moxham, Vice-President of the defendant, testified that he discovered that they had been hired, and instructed his assistant Mr. Dwinnell to discharge them as being entirely useless for any purpose which he had in mind (Record, pp. 676 and 7).

Mr. T. C. duPont (Record, p. 245) testifies that these detectives were employed because it was felt that some of the defendant's employees were being enticed away by Mr. Waddell, that after three weeks they discovered that this was not so and the detectives were discharged.

Mr. Waddell testified that he discovered that detectives were following him, and by taking assumed names and otherwise he avoided them (Record, pp. 760-61).

So far as we are aware, the above is all the testimony there is in the record in reference to detectives, and cer-

tainly there is nothing in it that indicates that they were hired for the purpose either of forestalling Mr. Waddell in purchasing a site, or of creating opposition among the people to the location of a plant, or for the purpose of bidding up the price of the property, or otherwise. In the above instruction, the Court certainly allowed the jury to use the evidence, such as it is, for its only legitimate purpose, and it is difficult to see what fault the plaintiff in error can justly find with this portion of the charge.

This assignment is discussed in a peculiar way at pages 175 to 180 of the brief of the plaintiff in error. It is there claimed by a course of reasoning that we are unable to follow that the reason given by Mr. T. C. duPont for the hiring of these detectives was not the correct one. It is then argued that Mr. duPont's reason being not the correct one, his testimony is evidence of the fact that the detectives were hired for the purposes mentioned in the declaration, although nobody testifies to that effect. The plaintiff in error prints in the discussion of this matter a letter from some detective agency, which letter was excluded from the record by the Court. However, the letter does not show anything, so we suppose it is unimportant.

Immediately after making the statement that is complained of, the Court instructed the jury that the fact that the detectives were employed was to be considered by them with the other testimony in the case as to whether it showed a hostile purpose on the part of the defendant against the plaintiff's enterprise.

Assignment of Error No. 9:

This assignment is based upon the refusal of the Court to receive in evidence a letter offered by the plaintiff, reading as follows:

"CHICAGO, Feb. 13, 1903.

H. A. KOACH, Esq.,
c/o Stratford Hotel,
Cincinnati, Ohio.

DEAR SIR:

This will be handed to you by Capt. H. R. Saville of the Philadelphia Agency, who has been

engaged in shadowing the party I wired you about in cipher, as follows:

'Wire immediately if R. S. Waddell of Wilmington, Delaware, is now in Cincinnati; think can be found South East corner Third and Broadway. Want to place shadow; therefore, inquire carefully and to which you replied as follows:

'Mail at party's office Union Trust Building indicates he will arrive tomorrow. He has home and family in this city.'

Will you kindly assist him as much as possible in locating the party, and just as soon as he locates him, he is to wire to Chicago for assistance.

Yours truly,

(Signed) J. H. SCHUMACHER, Sup't."

(Record, p. 759.)

It appears in the record that after Mr. R. S. Waddell left the employ of the duPont Company he made a trip through the country, looking up a site for his proposed powder plant, and as he said, making arrangements for the purchase of machinery, etc. After going to several places, he arrived at Cincinnati, and states that while there he was handed a letter by a gentleman he had known. He was then shown a printed volume of testimony that was taken in the suit brought by the United States against the duPont Company and others and stated that he gave the original letter to the Government and that a certain letter printed in said book was a copy; that he knew who Mr. Schumacher was at the time that letter was written. Upon being questioned further it appears, however, that any knowledge he has as to who Mr. Schumacher was consists of statements to the witness by the people who employed Schumacher; that he was then allowed to state that the people who employed Schumacher ran a detective agency and that they told him that Mr. Schumacher was a superintendent located in Chicago and at the date of the letter located in Philadelphia. Thereupon, the letter heretofore quoted, or rather the copy of it that appeared in the printed book, was objected to on the ground that it was irrelevant and incompetent and it was excluded by the Court.

The action of the Court in excluding this copy of the letter was proper in the first place because there is nothing whatever in this letter to connect the defendants or any of them with the writer of the letter, and, therefore, it was irrelevant and immaterial. In the next place, there was no proof whatsoever that the letter was actually signed and sent to anybody by Schumacher. In the next place, there is nothing in the letter itself which is at all relevant or material to any issue in the case. If it had been admitted, it is very difficult to point out what issue involved in this litigation the jury could have considered it as having a bearing upon. It purports to state that someone wants to put a detective on the track of Mr. R. S. Waddell and asks assistance in locating Waddell. There is no evidence in the record as to who it was that was actuated or what the purpose of this was.

Assignment of Error No. 10:

In pursuance of the defendants' request, the Court instructed the jury as follows (Record, p. 2517):

> "There is no evidence to the effect that the defendants or any of them exercised any control at any time over the affairs of the Equitable Powder Company or the Austin Powder Company by virtue of any stock that they have held in those corporations, and therefore you must not consider any claim to the effect that they did exercise such control."

The plaintiff excepted to this charge and that exception is the subject of this assignment of error. It appears that the predecessor of the defendant duPont Powder Company acquired forty-nine per cent. (49%) of the stock of the Equitable Powder Manufacturing Company. Mr. Olin, the president of the Company, thinks it was acquired by E. I. duPont de Nemours & Co., the partnership, in 1896 (p. 590). It also appears in the record that the predecessor of the duPont Powder Company also acquired thirty-three per cent (33%) of the capital stock of the

Austin Powder Company. These stock holdings were taken over by the defendant duPont Powder Company when it was organized in 1903.

The above charge of the Court, of course, is confined to the fact that the duPont Powder Company exercised no control over either of these corporations "by virtue of any stock that they have held in those corporations". This assignment is discussed in the brief of the plaintiff in error at length from page 109 to 130, together with the next Assignment No. 11, although these two assignments of error would seem to have nothing to do with each other.

So far as the discussion relates to Assignment No. 10, it goes far afield from anything included within the instruction complained of. It has principally to do with whether or not there is anything in the record to show that any combination existed between the Equitable and Austin companies and the duPont Company growing out of the Gunpowder Trade Association and other similar matters, and is not confined to a discussion of whether or not any control was exercised by virtue alone of the stock interest which the duPont Powder Company had. All such discussion has nothing to do with the matter. Whether or not an individual or a corporation that owns either thirty-three or forty-nine per cent. of the stock in another corporation thereby controls the affairs of that other corporation, must be a question of fact. If such control exists, the only way in which it would be capable of being manifested would be that thereby a Board of Directors would be elected in the interests of such stock holdings. That such a Board was never in existence cannot be denied. The duPont Powder Company and its predecessors at times had a representative on the Boards of those two companies, but that is as far as any participation ever went.

There is no evidence in the record to show that any such control was exercised over either corporation, and on the contrary, there is a great deal of evidence in the record to show there was no such control. Mr. Olin was

president of the Equitable Powder Manufacturing Company and he testified as follows at page 597 of the Record:

"Q. In reference to the stock ownership of the duPont Company in the Equitable Power Company, I understand that is 49 per cent.? A. Yes, sir.

Q. I desire to ask you as to the individual holders of the other 51 per cent., Mr. Olin, but I would like to have you state, if you have no objection, as to whether that 51 per cent. is held by a very few individuals? A. Very few.

Q. And is that 51 per cent. of stock harmonious in its action in reference to the control of the Equitable Powder Company? A. Entirely so.

Q. And has it been since the organization? A. Always been.

Q. And has that stock interest of 51 per cent. always controlled the Equitable Company and its policies? A. Yes, sir.

Q. How many directors have the duPont interests on the board? A. Two.

Q. How many of your interests? A. Three.

Q. Are there frequent directors' meetings, at which these two directors attend? A. No, sir.

Q. In a general way how often are those meetings held? A. The last meeting was subsequent to the annual meeting in February last.

Q. Now, in the practical operation of your company, and I refer to the period from its organization down to September, 1908, did the duPont Company or any of its officers, as a matter of fact ever dictate any policy of the Equitable Powder Company? A. No, sir.

Q. Did they ever have anything whatosever to do with the prices at which you sold your product to any customer? A. No, sir.

Q. Did they know how much you were charging for your powder to various customers? A. Only as they could get it from the customers.

Q. You never told them? A. No, sir.

Q. And they were not consulted? A. No, sir.

Q. Was any arrangement whatsoever made with the duPont Company as to a division of trade in reference to your customers, of the Equitable? A. No, sir.

Q. That was entirely managed by yourself and

the other internal officers of the company, was it not? A. Myself, principally.

Q. Where are the executive offices of the company located, Mr. Olin? A. The two that were referred to—C. L. Patterson, I think——

Q. I mean the offices? A. Their principal offices are at East Alton, Illinois.

Q. And is it from that office that the sales are made and prices fixed, and customers attended to? A. Yes, sir.

Q. And of course the duPont Company has no representative there and never did have? A. No, sir."

The members of the Executive Committee of the duPont Company have testified on this subject. Mr. T. C. duPont, President of the Company and member of the Executive Committee, states as follows (pp. 1902–3):

"Q. As a member of the Executive Committee and an executive officer of this corporation, do you know of any control exercised by the duPont Powder Company over the Equitable, Austin, Egyptian or United States Powder companies during that period? A. No, sir; none whatever.

Q. Was there any action ever taken by your executive committee or by your board looking to the exercise of any control over all or any of these companies? A. No, sir.

Q. Did you have anything to do whatever with shaping the business policy or the prices for black blasting powder charged by these companies or any of them? A. None whatever.

Q. Was there ever any arrangement made with these companies, or any of them, by the duPont Company, by which the duPont Company was to be compensated in any way for any losses which it might sustain in carrying on any competition against any competitor? A. None whatever.

Q. Was there any such arrangement or understanding, express or implied, between your company and any of those companies concerning the Buckeye Powder Company? A. No, sir.

Q. In view of that, of course, it follows that the duPont Powder Company never did receive any such compensation? A. None whatever."

The testimony of the other members of the committee is practically to the same effect and it does not seem necessary to quote it in full. It will be found in the following places in the record:

Hamilton M. Barksdale, pages 1910–11;
J. A. Haskell, pages 1932–34;
A. J. Moxham, page 1945;
P. S. duPont, page 1952.

The above testimony is not contradicted by anything in the record.

The brief of the plaintiff-in-error (p. 112) claims that this instruction negatived the plaintiff's contention that these two companies continued to act in combination with and as co-conspirators of the duPont Powder Company. If there is any evidence in the record to show that there was such combination and conspiracy, this instruction certainly does not do away with such evidence. It is further contended on the same page that the instruction supports the defendant's contention that the two companies were in active competition with each other. If the defendant's testimony as above recited is true, and there is nothing to refute it, it has the effect claimed only by negativing the fact that this stock ownership controlled those two companies. It is to be noted that in the very long list of co-conspirators prepared by the plaintiff and inserted in its amended declaration, neither the Equitable Powder Manufacturing Company nor the Austin Powder Company is mentioned as a co-conspirator; consequently it is not even charged that those two companies were in any combination or conspiracy (Transcript, p. 8).

The plaintiff in error details the amount of powder produced by these two companies, among others (brief, p. 114), and claims that it was not in competition with the defendants. Whether it was or not was all submitted to the jury and has nothing to do with the question of this stock ownership.

The brief cites the case of *United States* v. *Union*

Pacific Railroad Co. (226 U. S. 61), to the effect that minority interest may control a corporation (Brief, p. 129).

An examination of this case shows that the Court did not hold any such thing but held directly the opposite, that is, the question of whether any particular stock interest gave control of a corporation is a question of fact depending upon all the circumstances. It is true the Court held that in this particular case 46 per cent. of the stock was ample to give control, but it came to that conclusion because the testimony in the case showed that situation to exist. On page 95 the Court makes the following statement:

> "But it is said that no such control was in fact obtained; that at no time did the Union Pacific acquire a majority of the stock of the Southern Pacific, and that at first it acquired but thirty-seven and a fraction per cent. which was afterwards somewhat increased and diminished until about 46 per cent. of the stock is now held. In any event, this stock did prove sufficient to obtain the control of the Southern Pacific. It may be true that in small corporations the holding of less than a majority of the stock would not amount to control, but the testimony in this case is ample to show that distributed as the stock is among many stockholders, a compact, united ownership of 46 per cent. is ample to control the operations of the corporation. This is frankly admitted in the testimony of Mr. Harriman, the prime mover in the purchase of the Southern Pacific. It was purchased, he declared, for the purpose of getting a dominating interest in the Southern Pacific Company, and, he added, the Union Pacific did thus acquire such interest."

The plaintiff also cites the testimony of T. C. duPont and P. S. duPont in reference to the control of the duPont Company over the California Powder Works in one instance and over other corporations in which it was interested in another instance. An examination of this testimony, however, discloses the same situation. Mr. T. C. duPont says that the minority interest his company had in the California Powder Works practically controlled

it because the other stockholders took no interest in the business and left it to the duPont Company. Mr. P. S. duPont says the same thing in regard to the corporations he was speaking of, and instead of substantiating the plaintiff's claim, this testimony, of course, substantiates the defendant's claim to the effect that whether a stock interest gives control or not depends upon the situation and is a question of fact.

It is submitted that the instruction of the Court was correct to the effect that the defendant exercised no control over either of these corporations by virtue of the stock it owned in them.

Assignment of Error No. 11:

At the request of the defendant the Court instructed the jury as follows (Record, p. 2517):

> "There is no evidence showing that any of the defendants knew or had anything whatsoever to do with the purchase of the Buckeye powder plant and property by Mr. Olin and his associates, and therefore you must not consider the fact of such purchase as tending to establish any combination or conspiracy or other conduct prohibited by the Sherman Act."

The testimony in the record that justifies this instruction is full and uncontradicted. Mr. Olin and Mr. Lent personally and not in the name of any corporation purchased from Mr. Waddell and the other stockholders the property of the Buckeye Powder Company. It is, of course, to the interest of the plaintiff in error to maintain that this was done at the instance of the duPont Powder Company and a long and confusing argument to this effect is included in the brief of the plaintiff in error from pages 115 to 130. The record, however, is all to the effect that the defendants had nothing whatsoever to do with this purchase.

Referring to the plant of the Buckeye Powder Company Mr. Olin testified (Record, p. 1989):

> "Q. Now, when you bought this plant, Mr. Olin, did you have any communication whatsoever in reference thereto with the duPont Company or any officer connected with the duPont Company? A. No, sir.
>
> Q. Did they have any knowledge whatsoever of your intention of purchasing that plant? A. No, sir."

Further, on page 1990:

> "Q. You testified this morning that in purchasing the Buckeye Powder plant you did not disclose your object to the duPont Company. I will ask you if you took it up with any other powder companies besides the duPont Company? A. No, sir.
>
> Q. Was Mr. Lent associated with you in the purchase of the Buckeye Company? A. Yes, sir.
>
> Q. Outside of you and himself and Mr. Waddell and his stockholders, did anyone know anything about it? A. Not that I know of."

It, therefore, appears that not only is there nothing in the record which shows that any of the defendants had any such knowledge, but the record, on the contrary, shows exactly the opposite state of affairs.

At page 117 of the brief it is claimed that the Austin Powder Company was interested in this purchase. There is no evidence whatever in the record to this effect. The purchase was a personal one by Mr. Olin and Mr. Lent. It is there also stated that the ownership of the plant soon went to the Egyptian Powder Company, a concern that was controlled by the Equitable Powder Manufacturing Company. This is entirely incorrect and the only basis for this contention is Mr. Olin's testimony in this regard found on page 586 of the record which is as follow:—

> "Q. You are at the present time, I believe, connected with the company known as the Western Powder Manufacturing Company? A. Yes, sir.

Q. Located at Edwards, Ill.? A. Yes, sir.
Q. Do you have any other plants at which black blasting powder is manufactured except the Equitable and Western Powder Manufacturing Company? A. The Equitable have another plant——
Q. I mean the Equitable Company. A. The Egyptian Powder Company.
Q. What plants are they that the Equitable Company is interested in? A. The Equitable owns the plant at East Alton, Ill., and the one near Fort Smith, Ark. The Egyptian owns the plant in Williamson County, near Marion, in Southern Illinois, and the Western Powder Company's plant."

It is perfectly evident that Mr. Olin did not intend to say that the Egyptian Powder Company owned the Western Powder Company plant. The examination began with a question as to whether he had any other plants that manufactured blasting powder except the Equitable and the Western Powder Manufacturing Company. Then the following question was put to him:

"Q. What plants are they that the Equitable Company is interested in?"

He then answers:

"A. The Equitable owns the plant at East Alton, Ill., and the one near Fort Smith, Ark. The Egyptian owns the plant in Williamson County, near Marion, in Southern Illinois, and the Western Powder Company's plant."

It is perfectly apparent that Mr. Olin had in mind that he was being asked to state what black powder plants he was interested in. His answer is somewhat confused, but the other portions of the record show that the Western Powder Company was a separate corporation formed by Mr. Olin and Mr. Lent to acquire the Buckeye property. This testimony simply grows out of the confusion in Mr. Olin's mind as to just what was being asked him. The answer was in no wise confined to the question which was put to him and which was simply as to what plants

the Equitable Company was interested in. His answer manifestly goes beyond the question, thus indicating that he had it in mind that he was requested to give the names of all the plants in which he was interested. Furthermore, even if it did appear that the Egyptian Company owned the Western Powder Company plant, that in turn would not charge the defendants with any knowledge as to its acquisition, so the point is more or less immaterial in any event.

The brief continues with a discussion of the Gunpowder Trade Association, although the plaintiff's counsel is perfectly well aware that that Association disappeared in 1904, several years before the Buckeye Powder property was purchased.

It further appears that a month or so after Mr. Olin and Mr. Lent purchased this property, the duPont Powder Company bought some powder manufactured there, this for the reason that it had had an explosion in one of its Western plants.

There is not the slightest evidence that prior to the purchase of the plant, or as an inducement therefor, such an arrangement was in existence. The whole testimony is to the contrary. The arrangement is set forth in certain correspondence printed in the brief of the plaintiff in error from pages 119 to 121. The first letter which was dated November 18th, 1908, the plant having been purchased two months previous, refers to a conversation in New York as the beginning of the arrangement for the purchase of this powder. Mr. Olin testifies that that interview was three or four days prior to the writing of the letter (Record, p. 600).

The brief of the plaintiff in error maintains that this is not likely. Whether it is or not, certainly the Court could not have allowed the jury to speculate as to whether the arrangement in this letter was made weeks prior to its date and before Mr. Olin purchased the plaintiff's property, because there is certainly no evidence on which any such speculation could be based.

The brief of the plaintiff in error (p. 121) maintains that

Mr. Olin was not positive in regard to the date of the interviews and unwilling to put himself on record. His testimony previously quoted to the effect that the duPonts knew nothing whatever about the purchase of this plant seems to be sufficient record in this regard. It is next claimed that Mr. Patterson must have been obliged to consult the officers of the duPont Powder Company before buying this powder. If so, it would seem to be unimportant. It is next claimed (p. 123 of brief, plaintiff in error) that about this time Mr. Patterson went on the Board of Directors of the Equitable Powder Manufacturing Company with Mr. Haskell. Inasmuch as that company had nothing to do with the purchase, this fact, if true, would seem to be immaterial. It is next claimed that Mr. T. C. duPont in December, 1906, knew that Mr. Waddell was trying to sell his plant to some coal operators and, therefore, the duPont Company, being so thoroughly posted in that regard must have known of the sale to Olin two years later. This is a rather arm's length conclusion, but when we consider that the source of information that the duPont Company had in 1906 in reference to the then proposed sale to the coal operators was Mr. Ferdinand Luthy, one of Mr. Waddell's stockholders who corresponded with Mr. T. C. duPont and had several interviews with him (Record, p. 615 *et seq.*), the conclusion would scarcely follow that the duPont Company was favored with similar information in 1908. Although the defendants were unable to show the situation conclusively, it is quite apparent from Mr. Luthy's correspondence and his interviews that he went to Mr. T. C. duPont to threaten a sale of the Buckeye plant to the customers of the duPont Company in case Mr. T. C. duPont did not see his way clear to buy it out at that time.

Although Mr. Luthy denies that this was his object, a reading of his correspondence and his testimony on pages 615 to 627 of the Record will go a long way to convince one of that state of facts, particularly if we may apply the legal contention of the plaintiff in error made in this

case, that nothing need be proved by direct evidence, but is to be taken by surmise and implication.

It is next claimed in this regard (Brief, pp. 125 and 6) that the duPont Company gave up some of its trade to the Western Powder Company after Mr. Olin had purchased the Buckeye plant. There is not the slightest evidence in the record to substantiate any such statement.

It is next claimed (Brief, p. 128) that because the duPont Company owned stock in the Equitable and Austin Powder Companies, they were presumed to know about this purchase. Inasmuch as neither of those companies had anything to do with the purchase, it is difficult to follow this conclusion. Even if those companies did have something to do with the purchase, we do not think that minority stockholders are to be charged with knowledge of everything that is done by the owners of the majorty of the stock of the corporations in which they are interested.

The discussion is practically concluded by the inquiry (Brief, p. 128):

> "How is it possible to say that there is no evidence of a combination between these interests to control the explosives trade, or of the charge that the defendants knew of and had anything to do with the purchase of this plant?"

If there was a combination between these defendants it has nothing to do with the instructions complained of and that the defendants had any knowledge of Mr. Olin's intention to purchase the Buckeye plant is not only refuted by the direct evidence in the record, but there is not a scrap of evidence that can be pointed out as showing that such knowledge existed.

Assignment of Error No. 12:

This assignment is based on the instruction of the Court to the jury that there was no evidence that would sustain the allegations of the plaintiff that the defendant

had sold its powder below actual cost. This matter is discussed in the plaintiff's brief on pages 181 to 189. Most of this discussion relates to the testimony of Mr. Haskell and others as to whether the plaintiff could make money under certain conditions, a matter, of course, not involved in this assignment of error. The sole question here is whether or not the duPont Company sold its powder below cost. The long extracts quoted in the plaintiff's brief from Mr. Haskell's testimony contain no evidence that the duPont Company did any such thing. The long quotations from Mr. Patterson's testimony again show no such condition of affairs. The references to conditions in 1895 and theretofore are entirely beside the question, as they were not within the period involved in the Court's charge, and furthermore, the statements in the plaintiff's brief as to the effect of the evidence, even at that remote period, is entirely incorrect. The record shows no such state of affairs.

The only evidence bearing on the charge that the plaintiff is able to point out is a solitary statement of Mr. Waddell. This testimony of Mr. Waddell appears on pages 812 and 813 of the record. He was asked to give the circumstances by which he knew that the duPont Company had sold powder below cost, whereupon he answered:

> "In the cases where they sold powder at ninety cents, ninety-two cents,—in all cases of of that kind and in many cases where they sold at ninety-five cents delivered where the freight rate was high and in the district in which I operated."

In regard to this answer, there is no evidence in the record showing that the duPont Company sold any powder at ninety or ninety-two cents. Therefore, the proposition must be confined to his statement that in many cases powder when sold at ninety-five cents delivered where the freight rate was high was sold below cost. The record does disclose some sales by the defendants at ninety-five cents. It does not, however, disclose

anything in reference to the freight rates charged on those sales, nor in reference to the plants from which such orders were filled. Furthermore, the testimony of the defendant's witnesses all was to the effect that they never sold powder below cost. Under these circumstances, this answer given by Mr. Waddell, discredited as he was, cannot be considered to be evidence of the fact that the defendant sold powder actually below cost.

It is further to be observed that Mr. Waddell's answer confines these ninety-five cent sales in which he claims money was lost to his district.

In this regard it should be remembered that the cost to the duPont Company was probably considerably less than the cost to the Buckeye Company.

We further submit that this is a question which cannot properly be considered by the Court in the absence of substantial portions of the record which as heretofore pointed out are not included in the bill of exceptions. Such portions would modify the questions involved in this assignment of error very materially.

After having discussed Assignment of Error No. 12 as if it involved nothing except the foregoing matters, the brief of the plaintiff in error proceeds with a protracted discussion from pages 190 to 238 of certain portions of the Court's instructions to the jury alleged to be the subject of the same assignment of error. The portion of the charge here considered is as follows:

> "There is no evidence, gentlemen, that would sustain the allegations made by the plaintiff, that * * * cash, intoxicating liquors, household goods and clothing were distributed among miners to secure their influence with their fellow workmen to effect boycotts, * * * and my instructions to you are, as to these particular allegations, that they have not been established, and you will therefore disregard them entirely in your further consideration of the issue here being tried."

The plaintiff in error took no exception to anything contained in the above charge except as follows (Record, p. 2518):

> "Mr. Abbott: We also desire to except to Your Honor's instruction to the effect that there is no evidence that the defendant distributed cash to the miners.
>
> The Court: You may take an exception. I withdraw that question from the jury."

Despite the above limiting exception, the plaintiff in error has seen fit to enter into a long discussion of various methods by which the consumers of powder might have been influenced against the plaintiff's powder. It is evident that nothing can be here considered except the mere question of whether there was any evidence to the effect that the defendants distributed cash among miners to secure their influence to effect boycotts. The record discloses no such evidence.

From pages 194 to 198 of its brief, the plaintiff in error complains that after having instructed the jury that there was no evidence to support these allegations and withdrawing the entire question from the jury, the Court commented at length on the evidence relating to what were known as the "Thrush Incident" and the "Spicer Incident".

The Spicer incident did not involve the distribution of cash, which was the subject of this exception, and was submitted to the jury in its entirety.

The Thrush incident, which was commented upon by the Court (see Charge, Record, pp. 2464–66), was submitted to the jury for all it was worth, and did not involve any question of distributing cash for the purpose of creating boycotts. It further appears that the Thrush who was advocating the introduction of duPont powder was employed by one Moffatt, who had no connection with the duPont Powder Company. This is a sufficient answer to the criticism of the plaintiff in error. The fact is, the Court did not withdraw the consideration of those incidents from the jury.

Beginning on page 198 of the brief appear what are termed "General Evidences of Improper Influences Exercised by the Defendants", all of which discussion has no proper place under this exception, but it will be here considered inasmuch as it has been briefed by the plaintiff in error.

The first point made is concerning certain agreements between the miners' associations and the coal operators' associations (Brief, p. 198). These agreements have nothing whatsoever to do with the matter under discussion.

The second contention is under the head of Pit Committees. There were pit committees probably in all of the mines, but that fact certainly is no evidence of any improper action on the part of the defendants.

In the third place, under the head "Employing Howlers", the plaintiff's brief recites certain testimony given by R. S. Waddell. In the Record, page 744, Mr. Waddell stated that the Oriental Powder Mills had had a contract for a couple of years with the Smoky Hollow Coal Company, which information he got from the Oriental Powder Mills; that complaint had been made by the Oriental Powder Mills that they were unable to supply the Smoky Hollow Coal Company because the duPont Company through its agent Donnelly had howlers in the mines of the Smoky Hollow Coal Company who would raise a disturbance when the Oriental powder went into the mines, and that the Oriental Company had asked the duPont Company to stop this practice; that Mr. T. C. duPont came into Mr. Waddell's office and asked him what he could suggest as a method of stopping Donnelly from hiring howlers in coal mines, complaining that Donnelly had howlers paid to raise trouble if any powder other than the duPont was used in mines at Springfield and in Northern Illinois and Iowa. Mr. Waddell had no suggestions to make, as he had no control over the Chicago office.

In the first place, this testimony relates to a time long before any period during which the plaintiff could recover

damages and in fact to a period prior to the formation of the plaintiff.

Mr. duPont absolutely denied having had this conversation with Mr. Waddell.

In the next place, it is plain from the conversation as detailed by Mr. Waddell that there was no personal knowledge on the part of either himself or Mr. T. C. duPont as to this matter; that at the most, if it were true, it simply indicated that some third party had made certain statements to Mr. duPont in this regard, which statements Mr. duPont in turn had discussed with Mr. Waddell. This certainly cannot be enlarged into evidence of the fact that "howlers", whatever they may be, were actually employed in this mine. The fact that the episode referred to occurred prior to the organization of the plaintiff is a sufficient reason why this conversation, if it occurred, cannot be considered as evidence supporting a request to charge which is specifically to the effect that the defendants employed people to circulate among various miners to cause them to become dissatisfied with and object to the use of powder manufactured by the plaintiff. We also call attention to the charge of the Court (Record, p. 2514), as follows:

> "The fact that Mr. Waddell, Sr., testified that he told certain persons certain things is no evidence of the truth of the things related".

A discussion then follows under the heading "General Conditions in the Peoria and Springfield Districts".

The testimony of Thomas J. Reynolds is mentioned, which nowhere refers to the duPont Company, or any of its officers.

A discussion follows under the heading of "Specific Instances of Influence of Miners against the Plaintiff's Powder".

The deposition of Mr. Horace Clark is mentioned, in which a letter was brought out to the Buckeye Company, saying that Mr. Clark would like to use their powder, but

his miners positively would not use anything but duPont powder. This is not evidence that that very sensible conclusion had been induced by any undue means. Something is made of Mr. Donnelly's trade report to the effect that Mr. Thiesen, superintendent of this mine, "was a good friend of ours and that the trade was all right". This certainly is no evidence of anything except good will.

Then Mr. Haskell's testimony is commented upon. All he says is that the only way of selling powder to a coal mine was to get the good will of the manager, a condition probably necessary to the sale of anything to any company. Mr. Haskell says that he has no recollection of any commissions being paid, although at times cases of shells were given.

The next statement mentioned relates to the Howarth & Taylor matters. A trade report is quoted to the effect that Mr. Taylor personally favors duPont powder and the miners favored Buckeye powder, and continues "that if the miners could be induced to demand duPont we might be able to secure a contract with Mr. Taylor, provided the price was any where near what he was paying for Buckeye". In the deposition of Mr. Taylor and his wife it appears that thereupon a test was made in the mine between the duPont and the Buckeye powder, the result of which was so much in favor of the duPont powder as to furnish very ample reasons as to any change of attitude on the part of the miners in regard to the two powders. That there was anything improper in this there is absolutely no evidence. This testimony is in the record at pages 2069 and 2082.

The next case mentioned is that of the Maplewood Coal Company. It appears the Pit Committee decided they would not use Buckeye powder and demanded duPont powder. An argument is made to the effect that the miners have much to do with what powder they shall use. We are willing to admit that they have almost everything to do with what powder they shall use, and why shouldn't they?

There is no evidence in regard to this mine that shows in the slightest degree that any influence was brought to bear upon the miners by any of the defendants. Mr. McElwee stated that the reason he ceased to use Buckeye powder was that they received unsatisfactory shipments of said powder that was not properly screened and graded (Record, p. 2138).

The next incident commented upon is one relating to the mines of Applegate & Lewis. Mr. Lewis and Mr. Morton testified that for certain reasons they wished to use the plaintiff's powder, but that the miners objected to it. A test was made which Mr. Morton claims was unfair to the Buckeye powder, because he discovered some of the miners undercutting the coal that was being taken out with the duPont powder, whereupon he ordered the test to be stopped. There is no evidence here whatsoever that the duPont Company had anything to do with it, or had used any influence whatsoever in the matter. There were reasons enough why the miners might properly prefer duPont powder rather than Buckeye.

The brief of the plaintiff in error next takes up for discussion the employment of Alec Thrush by one Moffatt, who was a salesman of Dooley Brothers, to advocate the introduction of duPont powder in a certain mine. The portion of Alec Thrush's deposition that related to the arrangement he made with Moffatt was excluded, but over the objection of the defendants the Court allowed the cross-examination of the witness to be read to the jury, the evidence have been taken in the form of a deposition. The cross-examination did disclose that Moffatt had agreed to pay Thrush five cents (5¢) a keg for such powder as was introduced. There is nothing in this incident that is contradictory to the instruction of the Court, but it further appears that the defendants were in no wise responsible for anything that was done either by Moffatt or by Dooley Brothers. Although the brief of the plaintiff in error (p. 215) makes the statement that Dooley Brothers were the agents of the duPont Company at Peoria, the record establishes the fact that they were not such agents and

particularly the fact that they had no authority from the defendants to adopt any such methods, if they were adopted.

The brief of the plaintiff in error (pp. 216-224) discusses the relations between Dooley Brothers and the duPont Company, with the intent of establishing the responsibility of the duPont Company for anything that was done by Dooley Brothers. The facts in this regard are as follows:

Mr. Moffatt was an employee of Dooley Brothers. In the first instance, it is apparent from the witness's own statement that what Mr. Moffatt did was in no wis- brought home to the firm of Dooley Brothers, his employers. Consequently, there is a hiatus there, but it is also true that there was no relation between Dooley Brothers and the defendants, or any of them, which would make the defendants responsible for the acts of Dooley Brothers, even if we were to admit that Moffatt was acting within the scope of the authority he had from Dooley Brothers.

Dooley Brothers was a partnership between the years 1903 and 1908, composed of James B. Dooley and his brother. They conducted a general business in the sale of coal, powder and mining supplies in Peoria, Illinois. Mr. James B. Dooley was examined as a witness for the plaintiff and his testimony is found at pages 606 to 615 of the record. He testified that he had occasion to use black blasting powder in the way of selling it and said he purchased it and resold it; that during the said period he so purchased and sold duPont Powder; had a written arrangement with the duPont Company covering his relations during the period in question but was unable to find it. He testified that when his partnership made a sale of powder to a customer his concern was responsible for the account. In some instances sales were made directly by the Powder Company to customers in his district and in that event the duPont Company paid him a commission (Record, pp. 606-608). In cross-examination

it turned out that there was only one instance in which the duPont Company had sold a customer direct and paid Dooley Brothers a commission; that ordinarily if the sales were direct Dooley Brothers had nothing to do with it (Record, p. 611). Mr. Dooley further testified that the duPont Company had nothing to do with the question of what salesmen Dooley Brothers should employ nor of the payment of them (Record, p. 611). Dooley Brothers controlled them absolutely; Dooley Brothers had to pay the duPont Company for the powder regardless of whether they succeeded in collecting the price of it from their customers or not (Record, p. 612). Mr. Dooley further testified that Mr. Moffat was a salesman of Dooley Brothers (Record, p. 614). The reference to Mr. Moffatt as vice-president and stockholder refers to a later date.

Certainly there is nothing in the above to the effect that Dooley Brothers are agents of the duPont Company; they bought powder from that company and resold it. It is therefore apparent that anything that was done by them or their employees cannot be charged to the account of these defendants.

In addition to the above, the plaintiff produced and introduced into evidence a number of contracts. These contracts fall into three classes.

First—contracts like Plaintiff's Exhibit P-162 on Page 2587, which is a contract between the duPont Company and Dooley Brothers, providing for the sale to Dooley Brothers of all the explosives and blasting supplies needed by Dooley Brothers for use or sale in the Peoria coal mining district, specifying the prices and terms of payment, contract to remain in force for a year and thereafter from year to year unless ended by sixty days' notice.

It will be noted that the above contract is dated in 1912, a period long after any of the matters involved in this suit, but there is a similar contract, Exhibit 1247-B, page 2722, dated in 1907.

There is nothing in this class of contract, to create any relationship except that of seller and purchaser.

The second class of contracts is illustrated by Exhibit 1247–AA on page 2724, which is a contract between the duPont Company and Dooley Brothers, whereby there is sold to Dooley Brothers all the explosives and blasting supplies required by Dooley Brothers for use of Sholl Brothers mines at Peoria, at certain prices and on certain terms. This contract, however, has in it a provision that the price shall be less five cents per keg commission to Messrs. Dooley Brothers.

It might be argued from this contract that Dooley Brothers were commission agents of the duPont Company, but even so, that does not make the duPont Company in any wise responsible for any act committed in the sale of powder by an employee of Dooley Brothers or in fact, for any act committed by Dooley Brothers.

There is a third variation of the contracts above mentioned, illustrated by Exhibit 732 on page 2590, which is a contract for the sale of powder to a coal company and is signed "E. I. duPont Company by Dooley Brothers, Agents". It is provided that the contract cannot become effective until accepted by the duPont Company at Wilmington. The most that could be claimed for this kind of a contract is that in some instances the Dooley Brothers were agents for E. I. duPont Company to the extent of negotiating a contract to be accepted by that company.

All of these contracts and anything that is in them are entirely beside the question, and even if it were established that Dooley Brothers were general agents of the duPont Company it would be immaterial because there could not be implied from any such situation, authority on the part of Dooley Brothers to commit an act that is forbidden by the law. Certainly that would not come within the scope of any agent's authority, and if such an act was committed it can in no wise be laid at the door of any defendant in this case until there is some evidence produced bringing home the knowledge thereof to such defendant.

The next incident discussed relates to the business of the Great Northern Fuel Company, at Novinger, Missouri,

a matter concerning which there was considerable testimony in the record. We think that we can dispose of the long discussion of this matter in the brief of the plaintiff in error (pp. 225–237), by pointing out the fact that it was a separate incident in the evidence, treated by the Court fully in its charge as a separate incident, and properly submitted to the jury. The only claim that can be made for the evidence by the plaintiff is that it indicated that a traveling salesman of the defendant, Mr. Spicer, went to this mine and influenced some of the miners to strike because the duPont was union powder and the Buckeye powder was not. A consideration of the evidence will show that this claim was entirely unfounded. As a matter of fact, the Buckeye powder was a union powder and the duPont powder was non-union powder, but certainly it cannot be claimed that evidence of this sort would justify an instrution to the jury in reference to the employment of miners and other persons to circulate among users of powder in coal mines to induce them to make protests and complaints to their employers against the use of the plaintiff's powder. Having submitted this evidence to the jury in some detail and having instruced the jury fully in regard thereto, certainly the Court was not called upon to give any such charge as here requested, indicating, and it does, that any such practice, if it existed, was a usual and general practice on the part of the defendants.

We submit that there is no evidence whatever which connects the duPont Company with any illegal methods in either the retention of the use of duPont powder in coal mines, or in the introduction of this powder into coal mines. The evidence shows that the duPont powder was a well known powder; that it had been manufactured for many years; that the miners were familiar with the use of it; that they had used it for many years; that they knew its strength; that they knew what results could be obtained by the use thereof; that working as they did, in the bowels of the earth, they would naturally prefer to use a powder which they had been accustomed to use, and

from the use of which they could obtain certain and exact results. Considering the danger of working in the coal mines and the dangers incident to the use of unfamiliar powder, it is not unlikely that the miners would desire a well known and standard powder in preference to one that had been made but for a short time and the introduction of which was being sought. In this connection, it must also be remembered that the miners paid to the operators a uniform price for the powder, namely, $1.75 per keg. This price the miners were obliged to pay. The operators naturally were desirous of securing powder as cheaply as possible and the evidence shows that the plaintiff, in order to introduce its powder, started out by making concessions to the operators to induce the sale thereof below the price charged by the duPont Company. The miners, paying as they did, such a large price for the powder in comparison with the price paid by the operators, were in the first place desirous of securing the powder that would mine the largest tonnage per keg, and, secondly, it is presumed that they were indifferent to the fact that the plaintiff's powder could be purchased by the operators for a lesser price than duPont powder. These reasons were undoubtedly the reasons which were the foundation for that which the plaintiff in its brief calls "prejudice," but which in fact was nothing more than a desire for self-preservation by continuing to use that which they had used and had found for many years satisfactory.

Assignment of Error No. 13:

The assignment of error is considered in the brief of the plaintiff in error from pages 291 to 224.

This assignment of error is based upon the instruction given by the Court to the jury to the effect that the plaintiff and the defendant each had a paid representative looking after its interests among the miners at a certain mine while a test was being made. The period, however, the Court stated to the jury, was in dispute between Mr. Thrush and Mr. Waddell.

There can be no doubt upon this record but that the Buckeye had a paid representative in that mine. His name was Alec Thrush, and he has testified to the circumstances and identified receipts for payments received by him from the Buckeye Powder Company. His testimony in this regard will be found in the record, pages 1865 *et seq.* Mr. Thrush testified as follows in reference to his arrangement with Mr. Waddell:

> "Q. What was it? A. He proposed to compensate me for my trouble.
>
> Q. How much was he going to pay you? A. He was going to pay me a dollar a day for looking after the business and furnish what powder I used free of charge.
>
> Q. And was anything said as to what was to happen in case you got the powder established in the mine? A. Not at that conversation, there was not. There was later.
>
> Q. Where was the later conversation? A. It was in his office in Peoria.
>
> Q. What was said in that regard at that time? A. That if we got the powder established there I was to get a commission on all powder that came in there.
>
> Q. After it was established? A. Yes.
>
> Q. How much commission were you to get then? A. I believe it was ten cents a keg" (p. 1866).

He goes on to say that thereafter he did his best to get the powder introduced.

On page 1877 appears a statement of account involving some of these payments to Mr. Thrush, which are identified by the witness.

Mr. Waddell, himself, president of the plaintiff corporation, testifies on page 2420 in regard to the matter:

> "I employed Mr. Thrush at $1. a day to go about the mines of Appelgate & Lewis after his days' work was done, to assist other men, other miners, in the proper use of Buckeye powder. He was a very successful miner with that powder. I agreed to pay him a dollar a day. He was employed for thirty days. I paid him $30. for that work."

He stated that Mr. Thrush's statement that he was employed for two months is not correct. He also introduced a voucher showing payment of $30. to Thrush from the Buckeye Powder Company under date of October 22, 1906, services for which said payment was rendered, being described as follows:

> "October 22, 1906.
>
> To introducing Buckeye powder in mines of Appelgate & Lewis Coal Company..... $30" (p. 2121).

One of the owners of the Appelgate & Lewis mines, Mr. R. E. Lewis, on cross-examination (p. 634, fol. 1901), was asked:

> "Q. You spoke of tests made at Hanna City. Do you recall in what year they were made? A. I could not say that, no."

On the following day Mr. Robert Morton, the Superintendent of the Appelgate & Lewis mines, testified, and was asked by Mr. Abbott the following question:

> "Q. You heard the testimony of Mr. Lewis yesterday, did you not? A. Yes, sir.
>
> Q. You heard him testify regarding a certain test that was made at the mines during the Fall of 1907? A. Yes, sir."

From this testimony it will be noted that Mr. Morton was basing his testimony upon what was supposed to be the testimony of Mr. Lewis, whereas, Mr. Lewis was unable to tell at what time the test occurred.

The brief of the plaintiff in error has quoted only a portion of the charge of the Court in this regard and makes the statement, page 223, that this instruction of the Court implied in some way that the plaintiff was endeavoring to secure the introduction of its powder by unfair means. There is nothing whatever in the charge of the Court to indicate this. On the contrary, the occasion of this portion of the charge was that the plaintiff claimed that the

defendant used unfair means to introduce the duPont powder and to get the Buckeye powder discarded, and in the Court's charge (Record, p. 2464 to p. 2466) this matter was submitted to the jury as being one of the plaintiff's claims together with a reference to the evidence relating thereto. Incidentally, the Court made the statement complained of which, as above shown, is fully supported by the record. It consequently appears that instead of indicating to the jury that the plaintiff was doing anything improper, the Court was submitting to the jury the plaintiff's claim that the defendant was guilty of improper conduct, and certainly stated the matter to the jury as strongly against the defendant as the facts warrant.

In reference to the statement that Mr. Alec Thrush was not present while this test was being made, the Court stated that the period was in dispute. It is also true that the period at which the test was made is not definitely established, and furthermore, the Court did not tell the jury that this man was present at the test, but simply stated that while the test was going on the plaintiff had a paid representative among the miners. This statement is perfectly true.

Assignment of Error No. 14:

This assignment of error is based upon the refusal of the Court to permit R. S. Waddell, a witness for the plaintiff, to state what caused him to make an investigation to ascertain how it happened that he received advices from his customers that powder had been shipped by his company before information in reference thereto had been received at his company's office.

It appears that Mr. Waddell was asked a series of questions on page 805 of the record as to whether he had caused an investigation into this matter to be made, which questions were overruled. He was then allowed to state that there were instances in which his company had made shipments of powder wherein the advice of such shipments reached him from other sources than the con-

signees before he had received that information. This testimony is somewhat mixed up, and it is not plain just what was intended. He mentioned four or five persons from whom he had received such information. He was then asked what these customers advised him and was not allowed to state. The plaintiff's counsel then made an offer to show that the witness had made an investigation and ascertained from certain railroad companies something in reference to how this information was promulgated. The Court refused to allow the witness to state this on the ground that it would be nothing except hearsay evidence (see pp. 809 and 10 of the Record).

It is apparent that this ruling was entirely correct because the offer was to have Mr. Waddell make a statement as to what somebody who was not called as a witness had on some occasion stated to Mr. Waddell. That proposition would not seem to require argument.

In the next place, the exception was not to the refusal of the Court to allow Mr. Waddell to make this statement, but the exception is to the refusal of the Court to allow Mr. Waddell to state what purpose he had in instituting the investigation, which it is claimed resulted in the hearsay evidence that was excluded. There is no question in the record that supports this exception. He was nowhere asked what his purpose was in instituting such an investigation. If he had been, it of course would have been entirely irrelevant and immaterial. In any view of the matter there was no error committed.

Assignment of Error No. 15:

This assignment is somewhat discussed in the brief of the plaintiff in error at pages 240 and 241. The plaintiff claimed that the duPont Company was obtaining information in reference to the details of its shipments of powder from certain railroad companies. Mr. John G. Miller was produced as a witness for the plaintiff and testified that having become suspicious of such a situation, he made an investigation and got the railroad company to make an

investigation of the circumstances. Whereupon he was asked the question:

> "Q. Now do you know what the result of that investigation was?" (Record, p. 322).

This question was excluded by the Court, to which the plaintiff excepted. It is evident that the question called only for hearsay evidence, not only this, but for a conclusion. It called for the statement of what certain third parties said to Mr. Miller, and further, if they said anything, it called for his conclusion as to what that information was. However desirable it may have been for the plaintiff to show that the defendant was obtaining information in reference to shipments from railroad companies, the fact remains that it was improper for the plaintiff to show such a state of facts by the introduction of hearsay evidence.

Assignment of Error No. 16:

This assignment is based upon the charge of the Court to the jury in reference to what was known in the course of this trial as the "Piatt Incident."

An examination of the record in regard to Piatt will show that the connection between Piatt and any of the defendants was of the most flimsy character, and we submit that nothing appears in the record that does show any responsibility on the part of the defendants, or any of them, for anything that Piatt was said to have done. If this be true, the plaintiff in error certainly cannot complain of this instruction, because it was much more favorable to it than it was entitled to.

It also appears that Mr. Waddell, who gave the testimony, made so many contradictory statements in regard to the matter that the whole situation was one that could not reasonably have been influential with the jury.

In the next place, the plaintiff in error reserved no exception to this part of the charge (Record, pp. 2518–2220). Furthermore, we see nothing unsound in the charge. It

is to the effect that while the giving of such information in and of itself is not illegal, nevertheless, when so procured, it might have been unlawfully used, and if so, should be so considered by the jury. It appears that no information could have been illegally used by the defendants, because plaintiff's own witness demonstrates that the attempt to get the information, if it was made, was entirely unsuccessful (Record, pp. 347-348.)

Assignments of Error Nos. 17, 18, 19, 20 and 21:

These assignments of error are discussed together in the brief of the plaintiff in error at page 249 and relate to the rejection of a number of letters from third parties to the plaintiff or its agents and certain conversations of third parties with a Mr. Miller who was endeavoring to sell the plaintiff's powder. The testimony was clearly in the nature of hearsay and of statements between third parties and as such was clearly inadmissible.

The plaintiff in error attempts to justify its exceptions in this regard by the decision of this Court in the case of *Lawlor* v. *Loewe* (235 U. S. 522) in which this Court made a statement to the effect that reasons given by the customers of certain people who were selling Loewe hats as to why they stopped selling were admissible.

We do not understand that this court or any other court has held that it is proper to introduce in evidence letters relating to miscellaneous matters and statements made by miscellaneous people as to why they would not begin to buy goods from a plaintiff. The assignments of error will be discussed separately.

Assignment No. 17:

This assignment is based upon the Court's refusal to allow John G. Miller, plaintiff's witness, on direct-examination, to answer three questions.

These questions called for a statement on the part of the witness as to what reasons certain concerns which

some years previously had been customers of the Laflin & Rand Powder Company, whose names are not disclosed in the record, gave him as to why they would not buy Buckeye powder from him. These questions are found on pages 326 and 327 of the record.

The questions called for a statement of conversations in the absence of the defendants between the agent of the Buckeye Powder Company and various individuals, not defendants or alleged co-conspirators in this proceeding, and not shown to have had any connection with the defendants. The evidence called for is strictly in the nature of hearsay.

Mr. Miller was examined as a witness for the plaintiff and his testimony in this regard appears at pages 323 to 327. It appeared from Mr. Miller's previous testimony that he was the general sales agent of the Laflin & Rand Powder Company from 1895 to the end of 1903. He then went into the brokerage business in Chicago, had conducted that business ever since, but made arrangements to sell Buckeye powder in 1904 (Record, p. 305).

It appears on page 323 that the plaintiff's counsel handed Mr. Miller a list, purporting to give certain names of customers who the witness knew were under contract with the Laflin & Rand Powder Company while the witness was connected with that company, that is, in the period between 1895 and December 31, 1903. Thereupon, the witness was asked to state whether any of the persons on that list operated in the territory in which the plaintiff was located and doing business. He stated that some of them did, whereupon he was required to examine the list and state which ones on the list he called upon. He then gave the names of the companies on the list whom he did not call upon.

It is, therefore, apparent that there is nothing in the record to show the names of the concerns on whom he did call, the said list not having been put in evidence and not appearing in the record.

After the matter had been developed to this point, he was asked if he got business from all these concerns that

he did call upon and he said he did not; then he stated that they gave him reasons why they would not buy his powder. He was then asked the following question:

> "Q. State what those reasons were as given by them?"

This question was excluded, and he was then asked the following question:

> "Q. Did any of the reasons which were given to you involve these contracts which were in existence?"

This question was excluded. He was then asked the following question:

> "Did any of the reasons which were given to you by these parties, or any of them, involve the question of special prices that had been made to them by any other manufacturer of powder?"

This question was also excluded (Record, p. 326).

This assignment of error is based upon the ruling of the Court on these three questions.

This proposition is discussed in the plaintiff's brief (pp. 249 to 252), and it is there attempted to justify the plaintiff's position by the recent decision of the Supreme Court in the case of Lawlor *v.* Loewe (235 U. S. 522), known as the "Danbury Hat Case", with the statement that the whole question of hearsay evidence seems to be fully covered by that decision.

We submit that the decision has nothing to do with a situation such as the one here disclosed.

The only reference to the matter in the opinion of Mr. Justice Holmes in the above case is as follows:

> "The reasons given by customers for ceasing to deal with sellers of the Loewe hats including letters from dealers to Loewe & Company were admissible (3 Wigmore on Evidence, Sec. 1729 (2))."

In the Loewe case the testimony admitted seems to have been that of certain witnesses, as to the reasons given by people who theretofore had been purchasing the Loewe hats, as to why they withdrew their patronage from the people who were selling those hats. Of course the principle on which any such evidence is admitted is an exception to the general principles covering the admissibility of hearsay evidence, and its admission was upheld as such an exception. The limits of the exception under which it was admitted, therefore, become important. The evidence was not admitted as evidence of the fact that the defendants had been guilty of any illegal conduct, but was admitted as evidence of the effect on these particular people of illegal conduct of the defendants, which had theretofore been established by other independent and direct evidence.

Compare the above situation with that which confronted the Court when these questions were asked Mr. Miller, and the distinction between the two situations will immediately appear. Mr. Miller was not asked concerning any customers who had been shown to have been buying powder from the plaintiff company, nor was he asked concerning any customers who had been shown to have been buying powder from the defendants. The customers concerning whom he was asked and whose names do not even appear in the record, he states were parties who had been customers of the Laflin & Rand Powder Company during a period beginning ten years prior to the period involved in this suit and ending about the time the plaintiff began business. The record also shows that the people inquired about were not customers of the Buckeye Powder Company, and the inquiries made of Mr. Miller were not as to what reasons they gave for leaving the plaintiff or withdrawing their patronage from the plaintiff, but what reasons they gave as to why they would not make a change from a condition undisclosed by the record and give their business to Mr. Miller for the plaintiff corporation.

It is apparent that in getting rid of persistent salesmen many reasons might be advanced by consumers of powder, which would be entirely unreliable as evidence of any state of mind on the part of those consumers except irritation and lack of time. The situation of a customer who had already been buying certain goods, and who took affirmative action in changing his course of dealing, is a very different situation than one in which he was simply being solicited to become a customer for goods which he had never theretofore used and which had no established reputation.

To let down the bars in regard to hearsay evidence and to enlarge the exception referred to by Mr. Justice Holmes to such an extent as to admit evidence of this character for the purpose of establishing the real reasons that actuated miscellaneous people from refraining to buy Buckeye powder, would be going far beyond anything that is said by either Mr. Justice Holmes or in the authorities referred to by him, namely, Wigmore on Evidence, or in the cases cited by Mr. Wigmore.

The only authority cited by Mr. Justice Holmes in the Loewe case is Wigmore on Evidence, Section 1729 (2). The instances given by Mr. Wigmore clearly show that the rule is one that is applicable where the motive to be proved is a person's motive for doing some affirmative act. He says:

> "The typical instances in which motive becomes material are actions for loss of service or of custom in which it is necessary to show that the customer's or servant's abandonment of the plaintiff was motivated by the defendant's persuasion or threats; and actions, in which the reliance of a person upon another's representations becomes a part of the issue."

The above is exactly the situation in the Loewe case. The persons whose statements were allowed to be proved were people who were actively changing their course of conduct at the time they made their statements—that is, they were abandoning the plaintiff.

In this case it does not appear that any of the persons whose statements were attempted to be proved ever were customers of the plaintiff nor that they ever had any relations with the defendants.

Most of the cases cited by Mr. Wigmore are cases in which the statement of motive accompanied an affirmative act by the person who made the statement.

The reason on which this exception to the rule of hearsay evidence is based is thus stated by Mr. Wigmore (Section 1422):

> "(*a*) Where the circumstances are such that a sincere and accurate statement would naturally be uttered and no plan of falsification be formed."

As above pointed out, such might be the situation when a customer abandons one with whom he has been trading, but it is notoriously not the situation when a person is giving a drummer a reason for not buying his goods.

Another plain distinction between the Loewe case and this situation is that in the Loewe case the boycott had been established by other evidence as affecting the trade of the people whose declarations were admitted in evidence. In this case there was not the slightest proof that the people interviewed by Mr. Miller had ever come in contact with the defendants, nor that the defendants had anything to do with them; their names even are not given. This distinction is well pointed out in the case of *Elmer* v. *Fessenden* (151 Mass. 359), in which the opinion happens to be written by Mr. Justice Holmes when he was a justice of the Massachusetts court.

It was an action for slander, for having informed the plaintiff's workmen that the Board of Health had reported that the silk used in the plaintiff's establishment, and on which the workmen were employed, contained arsenic. The workmen left and evidence was excluded showing that at the time they left they assigned their reasons for leaving to the fact that there was arsenic in the silk.

The Court held that the exclusion of this evidence was error and after stating that such evidence was permissible to show the reasons the workmen had for their act in leaving, the Court made the following statement (p. 362):

> "The excluded testimony was not competent to prove that the defendant did tell the workmen the story. As to that, it was mere hearsay, and was not within the scope of the special reasons which led to the decisions last cited. *Roosa* v. *Boston Loan Co.*, 132 Mass. 439; *Chapin* v. *Marlborough*, 9 Gray, 244; *Bacon* v. *Charlton*, 7 Cush. 581, 586; *Aveson* v. *Kinnaird*, 6 East. 188; *People* v. *Thornton*, 74 Cal. 482, 486. It is admitted, however, that there was independent testimony that the defendant spoke to the workmen, and therefore the exceptions must be sustained."

It is therefore evident in the above case, which is one of the principal ones relied upon by Mr. Wigmore, that a preliminary to the admissibility of such evidence is proof of the existence of the facts which the persons stated were their motives for their conduct. If such evidence is not present, it cannot be supplied by the statements of such persons.

That these were the reasons for the exclusion of Mr. Miller's testimony on this subject is very apparent from the rulings of the Court in other instances, and the Court put the ruling on exactly the above ground.

Beginning on page 835 of the record, Mr. R. S. Waddell was shown a lot of contracts which the Buckeye Powder Company had, and was allowed to state the reasons given to him as to why some of the people with whom he had contracts ceased to buy powder from him. This sort of testimony continued for pages. On page 863 and following, he was allowed to state the reasons given him by customer after customer, whom, he said, he had lost. This continued up to page 867, when an objection by the defendants was renewed on the ground that the witness was proceeding to testify in regard to customers without show-

ing that any of the defendants had any connection with their trade, whereupon the Court said (p. 868):

> "Of course, if it does not connect with the defendants in either one or the other issues raised in this case, it is not pertinent.
>
> Mr. Button: We don't know any testimony that connects it.
>
> The Court: You see, the ruling began, Mr. Abbott, in those cases where there was evidence that the duPonts had furnished the powder. Now, as you extend this, if you get beyond anything where you can connect the defendants or any of their alleged co-conspirators with the sales, why, of course, the testimony is irrelevant."

In other words, the Court held just the same thing that Mr. Justice Holmes did, that is, that there must be evidence independent of the statement of the customers to the effect that there had been some interference with the particular trade by the defendants or some of them. No such evidence appears in regard to the people Mr. Miller was attempting to tell about.

Assignment No. 18:

This assignment of error is based upon the refusal of the Court to permit the plaintiff to read to the jury a letter written by Thomas Mackie, a purchasing agent, to the Buckeye Powder Company. The letter is in the record, page 504, and is to the effect that Mr. Mackie would like quotations from the Buckeye Powder Company.

The objections to this letter are practically the same as those referred to in the last assignment of error.

Furthermore, the fact that Mr. Mackie inquired what the Buckeye prices were, even if competently proven, would not be a relevant fact in this case.

The plaintiff's brief (p. 253) states that this letter was important to show that the plaintiff's prices were higher than those of its competitors and that thereby it had suffered an actual loss by price cutting on an amount of

business which would have been sufficient to absorb the plaintiff's entire capacity.

We do not doubt that many litigants would find it desirable to prove many facts by hearsay if the rules of evidence permitted it.

The record not only fails to show any connection of the defendants with this episode, but does affirmatively show that this business was secured by the Excelsior Powder Company, an independent concern, having a plant at Holmes Park, near Kansas City, where the properties of the Central Coal & Coke Company were located and which undoubtedly could sell at a less price than the Buckeye Powder Company, whose mills were located many hundreds of miles from the properties of the Central Coal and Coke Company.

Assignment No. 19:

This assignment of error is based upon the exclusion of another letter from Mr. Mackie which appears on page 505 of the record and is simply to the effect that the Buckeye Powder Company was not a successful bidder.

The discussion of the preceding assignment of error would seem to be sufficient to dispose of this one also.

Assignment No. 20:

This assignment of error is based upon the refusal of the Court to receive in evidence a letter written by J. W. Ferguson as President of the Waverly Coal & Mining Company to the Buckeye Powder Company, which letter appears on pages 509-510 of the record.

The letter states that the writer was "tied up with the duPont Company". Therefore, had wired the Buckeye Company to cancel the order. The writer proceeds to state that if the powder has been shipped, or if the Buckeye Company considers the powder to belong to the writer, the Buckye Company could antedate the invoice, "but don't give me away to the duPont Powder people".

It concludes by saying that he would be clear of them in a few months.

This letter was produced by plaintiff's counsel and shown to Mr. Ferguson, the writer of the letter, at the time Mr. Ferguson's deposition was being taken on behalf of the plaintiff (p. 509).

We can do no better in answer to this assignment of error than to quote the language of Judge Rellstab in excluding this letter. He stated as follows:

> "The Court: Well, but here you have the witness; this is not a case where you are seeking to put into the mouth of one person the declaration of another, but you are trying to put through the same mouth, understand, a letter that he wrote, * * * why didn't he give the facts which were contained in that letter while he was there" (pp. 2467-8).

Further the Court remarks:

> "The Court: He could see the letter then and you could interrogate him as to the contents of the letter—'Was not this so, wasn't that so'? 'It is so'; 'It is not so.' You see? The trouble in matters of that kind is this, that men do say things when they are not under oath that they wouldn't say under oath. * * * Now to say such a letter was written by such a person as that, who is on the stand, can be put in evidence as the fact, is contrary to all that I understand about the law, which excludes hearsay evidence" (Original Record, pp. 2469 to 2470).

Assignment No. 21:

The plaintiff offered in evidence certain letters passing between J. H. Somers & Company and the Buckeye Powder Company (pp. 858-863). The defendants objected to the offer of these letters, the objection was sustained and an exception was taken by the plaintiff.

To understand the basis of the Court's ruling, a part of the previous testimony must be given. This testimony

was that of Mr. Waddell, the chief witness of the plaintiff and president of the plaintiff company.

Mr. Waddell testified on page 856 of the record that he had sold a few carloads of powder to J. H. Somers & Company and that he then ceased to sell them, and that J. H. Somers & Company give him the reasons of their discontinuing the purchase of powder from the Buckeye Company. Mr. Waddell was then asked who obtained the business of J. H. Somers & Company, and his reply was the Austin Powder Company (p. 857).

It has heretofore been stated that the E. I. duPont de Nemours Powder Company owned 33 per cent. of the stock of the Austin Powder Company, but had no control or management of its business, and the Austin Powder Company was not even named as a co-conspirator in this suit. The offer of these letters was objected to on the ground that they were incompetent, irrelevant and immaterial and constituted hearsay evidence.

The record shows that the duPont Company had not secured the trade of J. H. Somers & Company. A reading of the letters shows that they merely deal with matters between the Buckeye Powder Company and J. H. Somers & Company, with which the duPont Company was in no wise connected.

These letters are hearsay and also wholly irrelevant. A reading of the same clearly shows that they have nothing to do with any issue in this case.

The Somers letters are printed at pages 858 to 863 of the record and refer to many facts, some existent at the time the letters were written and in many instances detailing past occurrences. The duPont Company is not mentioned in any of the letters. In the plaintiff's brief (p. 256) there are given four alleged reasons why these letters should have been admitted.

The first reason is that they showed the influence of the contract system in preventing the plaintiff from obtaining business.

It appears that the dealings of the Somers Company, if the letters and the previous testimony are to be be-

lieved, was with the Austin Powder Company. Consequently, they certainly cannot be evidence of any contract system inaugurated by the defendants.

The second reason is that the prices quoted by the plaintiff were higher than those quoted by its competitors.

This statement occurs in one of the letters, but who made the lower price does not appear from the record unless it may be inferred that the Austin Powder Company did it. Certainly this does not make the letters admissible,

The third reason given is that the letters show a direct attack made on the plaintiff by its competitors.

Whether this be true or not, it does not indicate that any attack was made on the plaintiff by the defendant.

The fourth reason is that the plaintiff lost profits because somebody quoted $1.02-1/2 to its customer, whereas the plaintiff quoted $1.05.

This, of course, does not make the letter admissible because there is no evidence that the price was one quoted by the defendants.

Assignment of Error No. 22:

This assignment of error is founded upon the refusal of the Court to admit in evidence the decree in the United States District Court for the District of Delaware in the case of the United States of America, Petitioner, against E. I. duPont de Nemours & Company, *et al.*, No. 280 in Equity, known as the Interlocutory Decree, and further for the refusal of the Court to admit in evidence the Final Decree in said proceeding.

The proceeding in question was a proceeding on behalf of the United States Government against all of the defendants in the present case and in addition thereto many other companies and some individuals. That proceeding was tried before the Circuit Judges of the Third Judicial Circuit, sitting as a special court under the provisions of the act generally known as the Expedition Act and resulted in the interlocutory and final decrees

which were offered in evidence by the plaintiff. This offer was made toward the end of the plaintiff's case and upon objection of the defendants the said decrees were excluded and an exception taken by the plaintiff.

We can think of only two grounds on which these decrees could be urged as admissible in this case. First, that the fact that such decrees were entered in the Government proceeding was a fact relevant to this issue. We do not understand that this claim is made nor do we see how the question of whether the Government was successful or unsuccessful and what findings and conclusions were embodied in those decrees can have any bearing upon the issues involved in the present proceeding. The second ground on which the admissibility of these decrees might be urged is that they were evidence of the fact that the defendants in this present case were guilty of some of the offenses under the same statute under which this action is brought. We know of no principle of law under which it can be claimed that these decrees are admissible for this purpose. Of course, we recognize the fact that a decree entered in a previous proceeding, wherein the issues were the same and the parties were the same, would not only be evidence but in most cases would be conclusive evidence in a subsequent proceeding between the same parties, involving the same subject matter, but in this instance neither of these two facts, which are the controlling facts, as to the admissibility of such records, exist. In the first place the parties are not the same. Ignoring the large number of other defendants in the former proceeding, the plaintiff in the former proceeding is not interested in this action. Furthermore the plaintiff in this action was not interested in the former proceeding. Consequently, there is an entire lack of the requisite identity of parties, nor is there any privity between the plaintiff in this case and the petitioner in the other case.

Nor is the other basis of admissibility of such evidence present, that is, the subject matter of the two proceedings is not the same. Ignoring again the fact that the

Government proceeding was for the purpose of administering equitable and injunctive relief, the issues that led to those decrees, such as they were, were entirely different from the issues in this action. There, in order to justify the decrees that were entered, it was sufficient to find offenses against either the first or second sections of the Sherman Law. As a matter of fact, the Court found the defendants guilty of offenses under both sections of that act, and, the conclusion is, of course, not open to question now that the pleadings in that action justified such findings and such decrees.

In this action the pleadings were such that the plaintiff was obliged to show offenses against the second section of the Sherman Law and no offenses against the first section of the Sherman Law, if they had been shown, could have availed the plaintiff in this action under the ruling of the Court, and in fact, under the pleadings as framed by the plaintiff. Consequently, all evidence in the Government proceeding that led to the decrees in question which was applicable to the first section of the Sherman Law is evidence that is entirely without bearing in the present action, and it having been presented in the Government proceeding, the presumption, of course, is, so far as this question is concerned, that if it had not been so presented, the decrees would have been otherwise. This is a sufficient reason for the exclusion of of the decrees.

To cite authorities upon the proposition that decrees entered in a former proceeding where the parties were different and where the issues were different are not admissible in evidence in a subsequent proceeding would seem to be a work of supererogation. Nevertheless, the basic principles are set forth with the simplicity that they deserve in the opinion of Chief Justice Marshall in the case of *Davis* vs. *Wood*, 1 Wheaton, 6, and, we may say, with all the discussion that such a proposition would seem to require. If any further corroboration of the views here set forth is required we submit that it will be found in the recent act of Congress supplementary to the

Sherman Law, commonly known as the Clayton Act, Section 5 of which is as follows:

> "SEC. 5—That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, That this section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity now pending in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken."

We, therefore, submit not only that there is no error in the ruling of the lower Court in this regard, but that it would have been reversible error if the Court had ruled otherwise.

The plaintiff in its brief seems to base its claim in favor of these two decrees upon two grounds:

First, that the decrees are proof of the fact that the defendants had been adjudged guilty of forming the same combination and conspiracy in restraint of trade, which was in issue, and Second, as an admission of guilt.

The first proposition we have already discussed to an extent in this brief. Of course these decrees are proof of the fact that in the Government's proceeding the defendants were adjudged guilty of unlawful combinations or conspiracies or an attempt to monopolize. No one disputes that; but that has nothing to do with the proposition that that fact is not a relevant fact in this action. This case is not based upon the proposition that the defendant had been dissolved by the Government or found

guilty by the Government. That fact has nothing to do with any issue involved in this case. Consequently, although these decrees may be proof of that fact, the fact in itself is inadmissible because it is irrelevant. In the same way the fact that a man has been convicted of assault and battery is not a relevant fact in a civil action for damages against him, although a judgment in a criminal action would be conclusive evidence of the fact that such a conviction had been had.

The second ground urged in the plaintiff's brief (pp. 264 to 267) is that these decrees are admissible as being an admission by the defendants that they were guilty of some offenses under the Sherman Law.

The law in reference to admissions as evidence of facts against the party making the admissions is fundamentally based upon the proposition that said admissions are voluntary statements by such parties contrary to the interests of such parties and therefore have a certain degree of verity and are received in evidence on that basis. The general principles in this regard are set forth in *16 Cyc., page 938.*

The claim of offenses under the Sherman Law on the part of the Government was strenuously combated by the defendant through all stages of that proceeding. The proceeding resulted, not in a consent decree, but in a decree *in invitum* against the defendants to the effect that they were guilty of offenses under that statute. This holding appears in the interlocutory decree offered in evidence for which it is not even claimed by the plaintiff that there was any element of consent.

Furthermore, when the final decree was formulated (Record, p. 3106) it took a double form. First, there is the same finding in the final decree, which is a finding *in invitum* against the defendants that they were guilty of offenses under the statute, a portion of the decree for which it certainly cannot be claimed that any consent was given by any of the defendants.

After having been placed in this position by the Court against their strenuous objection, the defendants did take

advantage of the permission granted by the Court to extricate themselves from the difficulties in which they found themselves—difficulties, however, which were certainly not brought about by any admissions on their part.

These decrees are now offered on the basis that they are admissions of offenses under the Sherman Law. The decrees themselves show that so far as that part of the holdings go, there were no admissions, but the decrees were entered absolutely against the contentions of these defendants.

The final decree then goes on to approve of the plan that was devised, and the only statement in that part of the decree which the plaintiff can point to as constituting an admission is that the defendants did not object to it. This is hardly an admission; the defendants were not in a very good position at that time to object to it. They had been found guilty, and this part of the proceeding simply related to the question of what was the best way out of that situation. It was to the plan to reorganize their business in harmony with the law that the defendants did not object. It is hard to see how this can be construed as an admission of their guilt of offenses against the Sherman Act.

It is, therefore, apparent that these decrees contain none of the elements of voluntary concessions or statements on the part of the defendants which are essential to support the proof of admissions by a party to an action.

Furthermore, the authorities cited in the brief of the plaintiff-in-error (pp. 261–267) justify the reception of these decrees on neither of the grounds urged by the plaintiff in error.

Portland Gold Mining Co. v. *Strattons Independence* (158 Fed. 63) as heretofore pointed out is a complete authority in favor of the defendants under Assignment of Error No. 3, but has nothing to do with the present proposition. It simply holds that where a tort feasor is liable only by virtue of the acts of another, a judgment

in favor of that other may be availed of by him. It certainly does not hold that a decree in a proceeding between other parties may be availed of in a different suit for the purpose of establishing guilt.

St. Louis Mutual Life Insurance Co. v. *Cravens* (69 Missouri, 72) simply holds that a judgment is evidence of the fact of the rendition of that judgment. This is undisputed, but is important only in a situation in which it becomes pertinent to show that a judgment was rendered, which is not the case here.

National Cash Register Case (222 Fed. 599, 629). It is claimed for this case that a decree of infringement of a patent was admitted as *prima facie* evidence of improper use of the patent laws against the rights of competitors. The case holds no such thing. It was a criminal proceeding under the Sherman Law against individuals, and among other things it was charged that they had used certain patents of the National Company as a basis for bringing suits against competitors, on the ground that those competitors were infringers. In other words, the bringing of such suits was one of the charges in the indictment and, of course, the fact that such a suit was brought was a pertinent fact to be proved as well as the result of the suit.

Coffey v. *United States* (116 U. S. 436) is a very good authority in favor of the defendants in this regard. The case involved proceedings for forfeiture under the Revenue Laws, and it appears that one of the parties had been previously proceeded against and acquitted upon the same facts. Therefore the subsequent proceeding was between exactly the same parties as the previous proceeding, and the same facts were involved, and this Court very properly held that the former judgment concluded the matter, but in doing so this Court stated (p. 443):

> "When an acquittal in a criminal prosecution in behalf of the Government is pleaded, or offered in evidence, by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the

> same; * * * But upon this record, as we have already seen, the parties and the matter in issue are the same."

Last Chance Mining Co. v. *Tyler Mining Co.* (157 U. S. 683); *U. S.* v. *Parker* (120 U. S. 89); *Nashville* v. *United States* (113 U. S. 261), have to do with nothing except the determination of a kind of a trial that must be had in order to result upon a judgment on the merits.

This assignment of error was the subject of the following comment by Judge McPherson, speaking for the Circuit Court of Appeals:

> "If we are to understand that the plaintiff is seriously insisting thrt the Court erred in refusing leave to offer the decrees in evidence that were entered in the Government's suit (C. C.), 188 Fed. 127), we shall only say in reply that we are not aware of any rule of evidence in force at the time of the trial that would have warranted the court in making a different decision. The parties in the two suits were different; the subject-matter was different; and the trial judge's ruling is so fully justified by the well-established law then existing that no supporting authority need be cited."

Assignment of Error No. 23:

This assignment is based upon the refusal of the Court to allow Mr. R. S. Waddell on redirect-examination to go into the details of what information he gave his attorneys respecting the allegations in Paragraph 11 of the amended declaration. The only basis for the claim that he should have been so permitted to testify is that on his cross-examination that paragraph of the declaration was read to him and he was asked if he gave that information to his attorneys, and stated that he did (p. 1248).

The question was

> "Q. I would like to read you these statements from your complaint, Mr. Waddell.
>
> (This section was then read).
>
> Did you give your attorneys the information on which that was based, Mr. Waddell?
>
> A. Yes, and I will be glad to give it here."

The Court's ruling was perfectly proper. It was based on the proposition that the matter had been exhausted; Mr. Waddell had said that he gave the information and this was the only object of inquiry on the cross-examination.

The evident purpose of the inquiry was to elicit a lot of hearsay evidence which had been ruled out from time to time during the course of Mr. Waddell's examination.

Assignment of Error No. 24:

This assignment of error is based upon the allowance by the Court of a question put to Olive Taylor, a witness for the defendants. Similar questions were put to quite a number of other witnesses, and, therefore, it may be well to set forth in some detail the circumstances surrounding the asking of this question.

Mrs. Taylor's deposition was taken in Illinois and it appeared that her husband was a mine operator at Edwards, Illinois, under the name of Howarth & Taylor. Mrs. Taylor assisted her husband as a secretary and kept the books of the concern. She stated from her own knowledge that a test of Buckeye powder had been made in the mine and stated the result thereof; that the reason the test was made was that some of the men asked for Buckeye powder. The powder previously used was duPont, Hazard and Laflin & Rand. The result of the test was very unfavorable to the Buckeye powder. After the test was made a representative of that company expressed surprise that the tests could have shown such a difference in the effectiveness of the powders involved. They did, however, from time to time buy some of the Buckeye powder for the purpose of letting any miner who desired it have that powder. Mrs. Taylor purchased all the powder. She then testified that after she commenced to use the Buckeye powder in the year 1904 she had no conversation or communication with any agent of the duPont Company with reference to Buckeye powder. The above testimony of Mrs. Taylor is contained on pages 2069–75 of he record.

She was then asked the following question:

"Q. Now, Mrs. Taylor, in a suit instituted in the United States District Court for the District of New Jersey, by the Buckeye Powder Company against the E. I. duPont de Nemours Powder Company and two other companies, known as the International Smokeless Powder and Chemical Company and the Eastern Dynamite Company, the Buckeye Powder Company, in answer to a demand for the names of customers of the Buckeye Powder Company induced by the defendants, or by the other persons or corporations I will name to you, the Buckeye Powder Company has given the name of Howarth and Taylor as one of the customers of the Buckeye Powder Company which was induced by these defendants and persons which I will name, to abandon the purchase of powder from the Buckeye Powder Company. The names of these persons are: Thomas Coleman duPont, Pierre S. duPont, Alexis 1 duPont, Alfred I. duPont, Eugene duPont, Eugene E. duPont, Henry F. duPont, Irenee duPont. Francis I duPont, Victor duPont, Jr., Arthur J. Moxham, Hamilton M. Barksdale, Edmund G. Buckner, Frank L. Connable, Jonathan A. Haskell; and the following corporations: International Smokeless Power and Chemical Company, E. I. duPont de Nemours and Company, E. I. duPont de Nemours and Company of Pennsylvania, duPont International Powder Company, Delaware Securities Company, California Investment Company, Delaware Investment Company, Hazard Powder Company, Laflin and Rand Powder Company, Fairmont Powder Company and Judson Dynamite and Powder Company. Will you now state whether or not any of the persons that I have mentioned here, or any of the corporations which I have mentioned in the question, or any agent or representative of those persons or corporations, ever induced you, as purchasing agent for your husband, Daniel Taylor, trading as Howarth and Taylor, not to purchase powder of the Buckeye Powder Company?"

(P. 2074.)

This question was objected to as being irrelevant and immaterial, calling for a conclusion, etc., which objection was overruled and exception taken.

Mrs. Taylor's answer was as follows:

"They never tried to induce us not to buy it."

On recross-examination the plaintiff's attorney questioned Mrs. Taylor with reference to her answer to the above question and developed the fact that she meant that no one influenced her because no person came to her and asked her to abandon Buckeye powder (p. 2081).

The amended declaration in this case sets out various so-called overt acts that the defendants were accused of committing for the purpose of establishing a monopoly and the language of the declaration is to the effect that these acts were used in most instances to induce the customers of the plaintiff to desert the plaintiff and become customers of the defendants. A motion was made in the Court below among other things to compel the plaintiff to make his declaration in these regards more specific by inserting therein a statement as to what customers were so induced to leave the plaintiff. The Court overruled this motion on the ground that it was unnecessary to insert such information in the declaration itself, but held that the defendants were entitled to the information and directed that it be supplied them in the form of a bill of particulars. Thereupon the bill of particulars that appears in the case was filed, containing the names of about three hundred and eleven different concerns, mostly coal mining operators scattered all over the Middle West, as being those so alleged in the declaration to have been induced to leave the plaintiff by the methods indicated. It being impossible to procure the attendance of these witnesses at Trenton, the defendants thought it necessary to take and did take the depositions of some thing like one hundred and thirty (130) of these witnesses for the purpose of demonstrating the fact that they were

not induced to leave the plaintiff company, as alleged in the declaration.

These witnesses were examined upon the general plan above indicated in the testimony of Mrs. Taylor. After having been asked about their experience with Buckeye powder and whether they had ceased using it, they were asked their reasons, and after having stated them a question like the one objected to was in many instances propounded for the purpose of proving what we conceive to be a relevant fact in this case. That is, whether or not said witnesses were induced by anything that was done by the defendants to make a change in the powder they were using. To begin with, if there were anything objectionable in this question, that objection would be cured by the fact that the witnesses gave the details of their experience with these respective powders and gave the reasons which induced them to change, if they did change. Therefore, to end up and round out their statements with a general question of this sort is simply to summarize the testimony already given. Furthermore, the testimony so given was the subject of cross-examination and the plaintiff's attorney did cross-examine the witnesses in these regards, often at length.

We submit that it is perfectly proper under these circumstances to ask a witness whether a certain defendant induced him to do a certain thing. It is equivalent to asking him whether he was influenced by that defendant to do that thing. In other words, it calls for the reasons that the witness had for his conduct in reference to purchasing powder and a statement of whether those reasons were the result of any action on the part of the defendants.

It is evident that these witnesses are the only ones who would be in a condition to enlighten the Court on such a subject and it certainly was a very pertinent fact in this case to show that no conduct, whatever it may be, good, bad or indifferent, on the part of the defendants, was influential in any determination to which the plaintiff may have come in regard to powder.

In the next place, under the circumstances outlined it is the only practical kind of a question that could be asked a witness. The only substitute that could be suggested would be to go through the category of every imaginable way in which the witness might be influenced and ask him whether or not any such thing was done. This would have been an interminable process and would undoubtedly have led to the same result.

It is difficult to see if this question was improper how it was harmful to the plaintiff. In every instance the history of the relations of the witness with Buckeye powder and duPont powder was fully given; the plaintiff's counsel fully cross-examined the witness and developed the ideas of the witness as to what the witness meant in the answer, if it was to the effect that he had not been induced not to purchase the Buckeye powder. Indeed, the question was advantageous to the plaintiff in error, as it threw wide open the door for inquiry as to whether any of the alleged wrongful methods had been used by the defendants or their alleged co-conspirators. The open door was taken advantage of on cross-examination as it was intended it should be. Having taken advantage of the invitation and elicited information in some instances cited in the brief as tending to prove the plaintiff's contentions, it is difficult to see where the plaintiff has suffered prejudicial error in permitting the question excepted to to be answered.

This question is referred to by the plaintiff in error as a hypothetical question. It is not and was not propouuded as such, and the rules of law applicable to hypothetical questions are not applicable to this.

Assignment of Error No. 25:

This assignment of error is based upon the instruction of the Court to the jury, as follows:

> "The plaintiff claims thirty cents a keg profit, but there is no evidence in the case that would justify the conclusion that that was a fair profit."

The above extract from Judge Rellstab's charge is only a small part of what he said on this subject. He went on to explain to the jury (p. 2505) that during certain periods that much, and even more, profit was realized by some powder makers, but that the record disclosed that at other periods powder was sold at prices that would not show anything near such a profit; that illegal restraints on the trade by the Trade Association alone permitted of the thirty cent profit on account of the arbitrary prices resulting therefrom. He then adds:

> "So far as this present record is concerned, the only basis for 30c. profit is that which is furnished by this arbitrary and therefore illegal means employed by the Trade Associations."

With the passing away of the Trade Association, that amount of profit could not be maintained unless there was an unusual increase in the demand; that the record shows there was no such increase, for various reasons.

We submit that the above is a complete and sound statement of the law as it is related to this record.

There is no evidence in the record that 30c. a keg is a fair profit on powder, despite the one statement from the testimony of R. S. Waddell that is quoted by the plaintiff in its brief on pages 286 and 7. This statement by Mr. Waddell was repeatedly repudiated by him in the course of his examination, both before and after the particular statement quoted in plaintiff's brief was made. It appears in the record (p. 773) that Mr. Waddell was shown a certain document marked "Plaintiff's Exhibit 52W for Identification", being a document never admitted in evidence, and he was asked how he arrived at the figures contained in that document "including thirty cents profit". He explained various figures that appeared on the document, and then added:

> "I want to correct that idea there in regard to the thirty cents profit. That was merely an approximate and was put on there by the young man who made up this list. That I did not authorize."

The above is not quoted in the plaintiff's brief.

Mr. Waddell then, at the insistence of his counsel and over the objection of the defendants, gave the equivocal testimony that is quoted in the plaintiff's brief (p. 287).

This evidence is clearly not sufficient to submit to the jury as evidence to the effect that thirty cents a keg was a fair profit during the period that Mr. Waddell was operating his plant. To begin with, he had not shown any sufficient knowledge of the subject to permit him to give an estimate of what such a fair profit would be, as was very conclusively shown upon his cross-examination. We submit that the statements quoted in the plaintiff's brief were clearly inadmissible in evidence.

On cross-examination it was developed that the only experience he had had from which he could even claim that anyone had got a profit of thirty cents a keg was during the operations of various trade associations, and he repeatedly admitted that there was nothing normal in those conditions and, therefore, of course, they were conditions on which he could not rely as a basis for any estimate of what a fair profit would be under normal conditions.

The following are statements made by Mr. Waddell on his cross-examination (p. 987):

> "I do not yet understand about these normal conditions in which there was no restraint of trade during this period. I understood you to say that there has never been a time since 1871 when conditions were not restrained. Did you not so testify?
> "A. There has never been a time since 1871."

His attention was then called to various periods in the history of the powder industry, and he testified that none of them were normal.

Page 988 he testified:

> "Q. That was not a normal condition then?
> A. No, nothing normal in the trust."

Again, in regard to another period (p. 988):

"Q. Was that a normal condition as you claim?

A. No, I should say it was abnormal. The trust was in power.

Q. Very good; now you have answered my question.

A. I am talking about the normal price.

Q. I am talking about normal conditions, and I think you know it, Mr. Waddell.

A. There has never been a normal condition since the organization of the Powder Association in 1872."

It is, therefore, apparent that Mr. Waddell's statement in regard to thirty cents profit at the most is only a guess on his part, and represents hope and not experience.

Further, at a later stage of his cross-examination he again entirely repudiated the thirty-cent idea. On page 1005:

"Q. Now, how much profit would you have gotten each year if you had gotten thirty cents a keg, Mr. Waddell?

A. I don't know.

Q. You were marketing under conditions there, were you marketing your total output?

A. I should have thought that plant, taking in the exigencies of the business, considering the exigencies of the business, the dangers of the plant being entirely wiped out in a moment, as the Indiana plant was, capital entirely destroyed, I should say that a profit of $50,000. would not be excessive.

Q. Then you are not willing to subscribe to a profit of thirty cents a keg straight through on your total capacity?

A. Well, you would not get thirty cents.

Q. Well, you have so stated in your papers here, haven't you, Mr. Waddell?

A. Well, there are a great many ways that thirty cents would go besides clear, for instance, at the end of the year——

Q. Nevertheless, you carried it into all those exhibits which you have been trying to get into evidence, didn't you?

A. No, I did not.

Q. Well, you had somebody do it for you, then, didn't you?

A. I cut that thirty cent idea when I fixed the prices.

Q. When did you do that?

A. When I fixed the prices for a distance, for instance, for a place in Illinois, $1.20.

Q. Then you don't think you ought to have thirty cents on 250,000 kegs, which would be $75,000 a year profit?

A. I think a part of that could be used in exigencies of the business, the demands that would come upon it.

Q. And you don't think you ought to have $90,000., which would be 30 cent profit on 300,000, which is one of the capacities which has been mentioned here of your mill, and that would be unreasonable?

A. I should think that would be an excessive claim. I should be satisfied with a more moderate amount."

The plaintiff's brief (p. 287) mentions the testimony of Mr. Haskell to the effect that certain prices were reasonable. This testimony referred entirely to a period during the existence of the trade associations, as did also that of Mr. Patterson,—periods long prior to the organization of the plaintiff.

Mr. Moxham's so-called "speech" is also referred to. This is simply a statement of what Mr. Moxham thought his company ought to try to get for powder in view of the fact that the times were very prosperous, the material for the speech having been furnished by Mr. Waddell, and there is nothing in it to indicate that such hoped for prices were either ordinary, reasonable or could be obtained.

Assignment of Error No. 26:

This assignment is based upon the instruction by the Court to the jury in regard to the measure of damages.

Under this assignment the plaintiff has quoted a long extract from the charge of the Court to the jury in

which it is stated that the plaintiff's claim is that 3-1/7 cents a keg is the amount of profit which the plaintiff had made during the only period in which it made any profit. This was stated to the jury as one of the facts to be considered by the jury in passing upon the question of whether the plaintiff was entitled to recover future profits which it was claimed it had lost on account of the illegal operation of the defendant (Record, p. 3215).

The only exception that we find in the record to this portion of the charge is as follows:

> "We except to that portion of your Honor's charge which limits our profits to 3-1/7 cents, or such portion thereof, as the jury may find" (p. 2520).

We do not find anything in the charge of the Court that does so limit the plaintiff. The only statement is that that is the plaintiff's claim. In fact, when this exception was taken, the Court remarked:

> "That is your own standard, although I verified it. You may take an exception to what I said in that regard" (p. 2520).

The record discloses that after many attempts the plaintiff finally promulgated a set of figures which resulted in an alleged profit of 3-1/7 cents and argued it to the jury. There wasn't any discussion or exception in reference to this amount being too small, but all the discussion that occurred was in regard to whether or not there was any amount of profit shown. We do not know of anything in this record that indicates that the plaintiff claimed a higher standard in this regard than 3-1/7 cents a keg. Therefore, the plaintiff certainly cannot be heard to complain that the Court adopted a claim made by the plaintiff itself.

The Court very carefully instructed the jury in regard to the matter of damages claimed by the plaintiff as profits which the plaintiff did not receive. This portion of the charge is at pages 2504 to 2512 of the record and

we submit that a reading of that charge, which is too long to be here quoted, well demonstrates the entire soundness of the position taken by the Court in regard to this matter. The claim of damages as formulated by the plaintiff and handed in as a memorandum is quoted on page 2496 as a portion of the charge, from which it appears that the plaintiff was claiming sixty-seven thousand odd dollars as loss of profits on powder actually made and sold by it, and about $154,000. for loss of profits on powder which it did not make, but claimed it could have made and sold at a profit. There seems to be no exception in the record covering the latter claim, or anything that the Court said about it.

The Court had told the jury that if the plaintiff's business was illegally interfered with by the defendants and the plaintiff thereby had suffered damage, it was entitled to recover that damage, provided it had been proven. The Court said:

> "But how much? This the plaintiff must show with reasonable certainty; upon him is cast the burden. Has he satisfied it? It is not to be determined at a guess, nor by the fact that we may believe that any unprofitableness of the plaintiff's business was due to the defendants' wrong doing, and then because of the consciousness borne in upon us by reason of such belief, proceed to arbitrarily fix the profit."

The Court goes on to state that the jury may exclude mere conjecture or speculation, and points out as we have heretofore shown in this brief, that there was no evidence as to what profits the plaintiff might have made, unless it was to be found in the history of the plaintiff's own business.

The plaintiff claimed that there was a period of twenty-two months immediately preceding September 18th, 1905, during which the plaintiff had made a profit. All damages prior to the date mentioned were cut off by the Statute of Limitations.

The Court told the jury that if they were satisfied that there was such a profit, which at the most was 3-1/7 cent.

a keg, and were further satisfied that that profit had been maintained for such a period and under such circumstances as to form a reasonable basis for finding that such conditions would have continued if not interfered with, then they might consider such previous profits as a basis for assessing damages for profits lost during the subsequent period by the plaintiff on the powder which the plaintiff actually sold.

We submit that in so instructing the jury the Court correctly pointed out the only possible evidence in the case which could be considered sufficiently definite to form the foundation for any assessment of damages in the regard mentioned. In fact, we submit that the Court was too liberal in this regard, and if it were necessary we could point out many things in the record that show that even this evidence was too remote and uncertain to form the basis of an assessment of damages.

The question involved is not whether the plaintiff is entitled to recover damages on account of illegal interference, but whether he has presented the evidence necessary in order to enable the jury to measure his damages.

This whole subject was exhaustively considered and effectively disposed of in an opinion by Judge Sanborn, *Central Coal & Coke Co.* vs. *Hartman* (111 Fed. 96). Judge Sanborn, in referring to many authorities, states:

> "The general rule is that the expected profits of a commercial business are too remote, speculative and uncertain to warrant a judgment for their loss."

The citation includes cases from the Supreme Court of the United States, the Federal Reporters and various state courts.

He then goes on to show that there is a notable exception to this general rule.

> "It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually is."

The Court goes on to point out that the only method of making such damages certain is by referring them to an anterior period during which such profits have actually been secured. If such period has been of a reasonable length and such profits have been made under normal conditions, the jury will be allowed to accept such conditions as evidence of what the future conditions would have been. If, however, no such previous period has existed in the history of the business, the plaintiff finds himself in the unfortunate position of possibly having been damaged, but being unable to recover therefor on account of a lack of proof. The Court says:

> "He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced."

The Court cites many authorities to support this proposition, and sums up the whole subject as follows:

> "The truth is that proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged of facts of equivalent import is indispensable to a lawful judgment for damages for the loss of anticipated profits of an established business."

This case effectively disposes of any contentions that the plaintiff can make under the portion of the charge involved in this assignment of error.

Assignment of Error No. 27:

This assignment of error is based on the instruction of the Court to the jury as follows:

> "As the evidence does not furnish us with a legal basis upon which we can determine, as a matter of fact, that the plaintiff could have sold on a profitable basis any more powder than it actually sold, no allowance can be made for such unmade or unsold merchandise."

The Court was correct in this instruction, because to allow the jury to consider how much powder the plaintiff might under some circumstances have made and then to further consider how much the plaintiff could have sold that powder for, and then to further consider whether or not the defendants prevented the plaintiff from making so much powder or from selling it at such a price, would allow them to embark into the realm of fancy.

Any such damages are entirely too remote, speculative and contingent to be recovered in an action at law.

We have already discussed this matter fully under Assignment No. 26.

Assignment of Error No. 28:

This assignment of error is based upon the instruction of the Court to the jury to the effect that the condition of the record does not permit the finding of any damages on account of the loss of good will.

There would seem to be one sufficient answer to this proposition. The jury was instructed that there was evidence which they might consider to the effect that a profit was made during one period of the operations of the plaintiff company. Thereby it was left to the jury to determine whether there was a sufficient profit shown for a sufficiently long period to be used by the jury as a standard by which to measure what future profits would have been, had they not been prevented by the illegal acts of the defendants. The jury having considered this matter and brought in a verdict for the defendants, must have done so in this regard on either one of two bases. First, that no illegal acts had been shown which resulted in damage, or second, that there was no such standard present in the case.

Inasmuch as that very kind of a standard is an essential element in any recovery for the loss of good will, it is evident that in passing upon questions that were submitted to the jury, the jury found against the plaintiff

on one of two propositione, either one of which findings would be equally fatal to any claim of right to recover for good will. Therefore, even if any fault could be found with this instruction, it is apparent that it was harmless.

This matter is discussed from page 297 to 305 of the plaintiff's brief, in which the position is taken that there is evidence of some good will growing out of three things as follows:

(*a*) Location of plant.

(*b*) Experience and character of Mr. Waddell and his salesmen.

(*c*) The rule used by accountants (notably Mr. Bruneau).

It is plain that even if all these things mentioned existed in connection with the business, if they did not result in a profit, their loss could not be the basis of damages whether it is permissible to put them in the category of elements of good will or not. It is admitted that during the period subsequent to September 18, 1905, none of these things resulted in any advantage to the plaintiff. Consequently, their loss did not injure the plaintiff in any way so far as any evidence in this record is concerned. It does not help the plaintiff to refer to a previous period in which he claims there was a profit, because if there was a good will during said period, its loss occurred prior to the date mentioned and is barred by the statute of limitations.

Furthermore, the last element of good will, namely, Mr. Bruneau's rule, thorougly refutes the plaintiff's contention. The entire basis of that rule as set forth on pages 304 and 305 of the brief is the "earnings" of the concern involved. Thereby, of course, is meant the net earnings. That element being absent, there is nothing on which to found a measure of the value of the good will.

Assignments of Error Numbers 1 and 2:

These assignments of error are to the refusal of the court below to set aside the judgment of the District Court and to the affirmance of the judgment of the District Court by the court below.

The plaintiff in error has considered these assignments in its brief from pages 305-311, and therein to an extent there are reviewed the assignments that have heretofore been discussed, and it is not our intention to add to the discussion thereof.

It is, however, claimed in the concluding pages of the brief that the result in this case is such that if upheld it will render any proceeding under Section 7 of the Sherman Law ineffective. In taking this position, it is contended that if a plaintiff is to be subjected to certain hardships that are therein mentioned Section 7 of the Sherman Act might as well be stricken from the statute books. The obvious answer to this argument is that the plaintiff herein was not subjected to any of the hardships that are mentioned. The complaints seem to be as follows:

That the plaintiff was held to ancient and technical rules of pleading. This is not true. It was simply pointed out to the plaintiff that if it desired to avail itself of two causes of action, it should have supplied two counts to its declaration,—a not unreasonable request.

It is next contended that the plaintiff was obliged to prove all allegations by direct and positive evidence and that it was allowed to leave nothing to inference. This is not true. The District Court left many matters to the inference of the jury. This did not satisfy the plaintiff, but the plaintiff insists that matters should have been left to be inferred by the jury when there was nothing whatever from which they could be inferred.

It is next contended that the plaintiff was required to show that each member of a conspiracy actually partici-

pated in all of the overt acts committed in pursuance of the conspiracy. No such thing was held by the Court, but it was held that before a defendant could be subject to that rule it must have been shown competently that such defendant was a member of the conspiracy,

It is next contended that the plaintiff was required to prove the defendants' guilt out of their own mouth. This is not the fact. The plaintiff was required to conform to the not unreasonable rule that he must prove such contentions out of the mouth of somebody. Plaintiff seems to feel that it was unnecessary for it to prove them at all.

It is next contended that the plaintiff was held to stand in a different relation to the transactions than he would have sustained if he had entered business previously. No such thing was held except to the extent that the jury was told that no specific injury could have been done to the plaintiff's business by things that occurred previous to the plaintiff's commencement of business.

It is next contended that the plaintiff was required to clear itself of a suspicion that it did not intend to conduct a legitimate business. This is not true. There was much evidence to the effect that the plaintiff did not intend to conduct a legitimate business, a situation which, of course, would have a very substantial bearing upon the matters in controversy, and that evidence, such as it was, was all submitted to the judgment of the jury under fair and adequate instructions.

It is next contended that the Court held that a competitor had a right to follow Waddell around with detectives to prevent him from obtaining employes and other purposes. This is not true. All the evidence in regard to detectives was submitted to the jury in full for its consideration.

It is next contended that the Court held that the defendant had a right to exercise surveillance over the plaintiff's trade for the purpose of acquiring the secrets of its business. No such thing was held. All evidence in

the case in reference to such matters was submitted to the judgment of a jury.

It is next contended that the Court held that the plaintiff must engage in a fight in which the victor is justified in going away with the spoils. The instructions of the Court, as limited by it, were perfectly proper.

It is next contended that the plaintiff was subjected to a price-cutting contest and the defendants sold their goods at a loss. All matters in regard to price cutting were submitted to the jury and there was no evidence that the defendants sold their goods at less than cost, and in fact, the evidence clearly showed that all price-cutting contests were begun by independent companies and largely headed by the plaintiff itself.

It is next contended that the Court held that the plantiff must submit to the stirring up of prejudice, boycotts and strikes against his product. There was no evidence in the record in this regard, except possibly what was known as the "Spicer incident", which was fully submitted to the jury and passed on by it.

It is next contended that the plaintiff was denied the right to recover for such losses as it may have sustained by reason of having been prevented from doing business. The Court took no such position. It simply again insisted that in order to recover damages the plaintiff must produce some adequate evidence of the amount of those damages.

Based on the above unjustified contentions, the plaintiff in error complains of the ineffectiveness of the law as administered in this case.

Inasmuch as none of these contentions are justified by the record, it is unnecessary to pursue the subject at length, but it may not be out of place to direct the Court's attention to the fact that the position of the plaintiff results in the claim that the Sherman Law is ineffective unless a plaintiff who has succeeded in producing no adequate evidence is to be allowed a recovery of upwards of three million dollars ($3,000,000), not to forget

an adequate attorney's fee, as recompense for unproved injuries to a business in which the plaintiff never invested more than one hundred and fifty thousand dollars ($150,000), and to the conduct of which business the plaintiff brought neither adequate capital, business or technical experience, or that degree of upright and fair dealing that is necessary to inspire confidence in the minds of customers and business associates.

A fair reading of this record shows that Mr. Waddell, a man who had been a trusted employe of the defendant for twenty (20) years, who had been a large participant, if not an originator, of many of the methods in the black powder business concerning which he complained, after having observed the successful enterprise of one of his assistants in building a powder mill and selling it out to the defendants at a profit after having demoralized the defendants' trade, undertook to emulate such example, fully convinced, as he told Mr. Rice, that he would not be required to manufacture powder, but would engage in the business of manufacturing prices. Under such circumstances he built a flimsy mill, began to cut prices, had no money, no experience as a powder manufacturer, no integrity, manufactured powder that could not be used, failed to furnish that powder, such as it was, according to his contracts, devoted his time to attacks upon the defendant rather than to the advancement of his own business, and eventually reaped the logical conclusion of such methods in coming to a point where he was obliged to sell his business to a man who did know how to run it and who, immediately upon the acquisition thereof, rebuilt his plant and made real powder and in a measure achieved some success with the enterprise. Further than this, a fair reading of the testimony of Mr. Waddell, whose testimony contains the chief evidence relied upon by the plaintiff, will show that Mr. Waddell stood before the jury entirely discredited in everything he had testified to and largely from correspondence and documents signed by himself.

We submit that if an enormous verdict must be insured to such a plaintiff in order to save the Sherman Law from annihilation it would be much better that such annihilation should ensue, than that such a measure of encouragement should be afforded to every illegitimate enterprise that sees fit to prey upon the community.

The judgment should be affirmed.

Respectfully submitted,

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-5-

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No. 37

Supreme Court of the United States

OCTOBER TERM, 1916.

THE BUCKEYE POWDER COMPANY (a Corporation),
Plaintiff-in-Error,

against

E. I. DU PONT DE NEMOURS POWDER COMPANY (a Corporation of New Jersey), EASTERN DYNAMITE COMPANY (a Corporation of New Jersey) and INTERNATIONAL SMOKELESS POWDER & CHEMICAL COMPANY (a Corporation of New Jersey),
Defendants-in-Error.

In Error to the United States Circuit Court of Appeals for the Third Circuit.

Reply Brief of Plaintiff-in-Error.

TWYMAN O. ABBOTT,
WILLARD U. TAYLOR,
Counsel for Plaintiff-in-Error.

ROYAL LAW PRINTING CO., 79 WALL STREET, N. Y.

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Supreme Court of the United States,

OCTOBER TERM, 1916.

THE BUCKEYE POWDER COMPANY (a corporation), Plaintiff-in-Error, against E. I. DU PONT DE NEMOURS POWDER COMPANY (a corporation of New Jersey), EASTERN DYNAMITE COMPANY (a corporation of New Jersey), INTERNATIONAL SMOKELESS POWDER AND CHEMICAL COMPANY (a corporation of New Jersey), Defendants-in-Error.	No. 249.

REPLY BRIEF OF PLAINTIF-IN-ERROR.

There are so many unsupported assertions and denials in defendant's brief concerning the record in this case, which are calculated to confuse or mislead the Court, together with important admissions which do, in fact, support some of plaintiff's assignments of error to the extent of proving them to be well taken, that it seems to be necessary to make a short reply thereto.

Furthermore, in making a study of some of the arguments therein set forth, a new point has been discovered which, if we are right in our contention, will alone have the effect of reversing the judgment.

The point is this: The law has been amended since the judgment was rendered so as to suspend the operation of the Statute of Limitations in favor of the exercise of the remedy provided for by Section 7 of the Sherman Law, which we claim to be applicable to the present action; and thereby a new legal right has been given to plaintiff pending the final review of the action of the Trial Court.

It is the undoubted law of this Court, as established in many cases, that, whenever a new law intervenes after a judgment, and during the pendency of the controversy in an Appellate Court, so as to change the rule which governs the rights of the parties, "the Appellate Court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered."

Gulf, Col. & S. F. Ry. vs. Dennis, 224 U. S., 506;
United States vs. *The Peggy,* I Cranch, 103;
Gwin vs. United States, 184 U. S., 675;
Dinsmore vs. Southern Express Co., 183 U. S., 120;
Mills vs. Green, 159 U. S., 651.

We respectfully call to the attention of the Court that Section 5 of the Act of Congress of October 15, 1914, known as the Clayton Act (38

U. S. Stats., 730) contains the following provision:

> "Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the anti-trust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the *pendency* thereof."

This action was begun on September 18th, 1911. The defendants plead the statute of limitations in bar, and the Court sustained the plea so as to limit plaintiff's recovery to such injuries as had been sustained within six years prior to said date, namely, September 18, 1905 (Trans., p. 2507, fol. 7521). Plaintiff began actual business in September, 1903, and, therefore, by this ruling was deprived of the right to be heard as to such damages as it suffered during those two years.

The amended petition in the case of the United States vs. The E. I. Du Pont de Nemours & Co., 188 Fed., 127, was filed on the 5th day of August, 1907, and the final decree was entered therein on the 13th day of June, 1912. Said action is known in the record in the present case as the "Government Case."

It was a "suit or proceeding in equity" instituted by the United States to prevent, restrain or punish violations of the anti-trust laws, and plaintiff's right of action was based in part, if not in whole, on matters complained of in that suit.

The question is, does the statute above quoted operate to extend the period of limitations applicable to plaintiff's right of action which was in process of enforcement at the time of its enactment?

If this question is answered in the affirmative, then the running of the Statute of Limitations against plaintiff's right of action was suspended from August 5th, 1907, to the 13th day of June, 1912.

> "When the statute declares generally that no action, or no action of a certain class, shall be brought except within a certain limited time after it shall have accrued, the language of the statute would naturally make it apply to past actions as well as those arising in the future."
>
> Sohn vs. Waterson, 17 Wall., 596, 599.

The intent of Congress to make this provision retrospective is also evidenced by the fact that Section 5 is divided into two distinct paragraphs, the first of which relates to "a final judgment or decree *hereafter* rendered," and provides that it shall be *prima facie* evidence in other proceedings. The second paragraph is the one above quoted in full relating to the Statute of Limitations.

It would seem that by separating the section into two distinct paragraphs—especially in view of the fact that the first paragraph is so unmistakably limited to future actions—Congress intended to clearly differentiate the two subjects. Furthermore, the provision itself says that whenever any suit or proceeding *"is"* instituted—not "is hereafter" or "shall be" instituted.

It seems clear from the language of the statute, and also from the circumstances under

which it was made part of Section 5, that it was the intent of Congress to give a person bringing an action under Section 7 of the Sherman Act, whether pending before or after its passage, the benefit thereof.

The record shows that it was during this period that may of the acts complained of were committed by the defendants.

The evidence shows, as has already been pointed out in our former brief (see pages 100-101), that it was during this period that the trade in the immediate neighborhood of Peoria, Ill., was practically all tied up by contracts in anticipation of the entry of plaintiff into that field. (See Plaintiff's Exhibits 1143, 1144, Trans., pp. 2708-2718.) And there are many other important facts which have an immediate bearing upon the question of damages during that period, which do not apply as effectively to the subsequent period.

Furthermore, it was during this period that plaintiff made profits amounting to 3-1/7 cents per keg, which although grossly inadequate, would have authorized the jury to find that plaintiff had *good will,* even according to the rule adopted by the Court. This is made clear by the argument of the defendants where it is contended that because all the facts pointed out by us in our former brief as going to prove good will failed to show a profit, after Sept. 18, 1905, their loss could not be made a basis of damages, for the reason that "all damages prior to the date mentioned were cut off by the Statute of Limitations" (Defendants' brief, p. 115). The following statement (p. 119), covers their contentions, which were finally adopted by the Court:

"It is admitted that during the period subsequent to September 18, 1905, none of these things resulted in any advantage to the plaintiff. Consequently, their loss did not injure the plaintiff in any way so far as any evidence in this record is concerned. It does not help the plaintiff to refer to a previous period in which he claims there was a profit, because if there was a good will during said period, its loss occurred prior to the date mentioned and is barred by the statute of limitations."

Unsupported Assertions and Denials.

It is unfortunate that the defendants have seen fit to base their contentions, with respect to some of the issues, largely upon assertions and denials, which they do not support by references to the record.

Time and again they assert, without controverting plaintiff's citations or references to the record, that "this is not a fact," or "the record discloses no such evidence," or "this is not true," and no references to the record are given to support these bald and blunt assertions.

It would therefore serve no useful purpose to attempt a complete reply to a brief of this character. But some of the statements concerning the evidence, and concerning plaintiff's position with respect to the issues, are made so boldly and repeated so frequently, that unless controverted, it might appear that we had conceded them to be true. Furthermore, their very boldness might well be misleading to the Court.

Attempt to Confuse the Court with Immaterial Issues.

On pages 4-9 of defendants' brief there appears a statement of eleven so-called "propositions" concerning which, it is said, there was evidence offered on both sides, "and that such evidence was submitted to the jury and all questions in reference thereto were foreclosed by the verdict of the jury, or else the plaintiff-in-error succeeded in producing no evidence whatever in reference thereto."

None of these "propositions" form the basis of assignments of error except the first, fourth, and fifth, relating to the employment of detectives, spies and railway agents; and nothing was foreclosed by the verdict of the jury except those matters which were *properly* submitted to them, and then only insofar as such questions related to the defendant Du Pont Powder Company.

The assertion is frequently made in various forms throughout the brief, that certain questions have been "foreclosed by the verdict of the jury," and we wish to repeat with emphasis what was said in our former brief, once and for all, that there is not a single issue involved, in any of the assignments of error, which relates to the action of the jury in exercising its fundamental right to pass upon the *weight* of the evidence which was submitted to them.

Whatever is said in plaintiff's brief about any of the matters which do not form the basis of specific assignments is said in connection with the direction of a verdict in favor of the Eastern Dynamite Company and the International Smoke-

less Powder Company, and as *to these two defendants* no evidence was submitted to the jury or foreclosed by their verdict.

The Attempt to Prejudice the Court on the General Issue of a Meritorious Cause of Action.

The method of presenting the defense seems to have for its object to create the impression that even though there may have been error committed, the plaintiff is wholly without standing in good conscience, because it has had its day in court, and therefore, should not be heard to complain.

On page 8 of defendant's brief, we find the following statement, with not a single reference to the record to support it. It is, in fact, a paraphrase of what was said by the Circuit Court of Appeals in its opinion (Trans., p. 3185), and for this reason deserves some attention (The parenthetical references are ours for convenience):

> "Hundreds, if not thousands, of pages of the record go to show that the misfortunes of the plaintiff were due, not to any attack by the defendants, not to any undue conditions in the trade for which the defendants were responsible, but on the contrary were due to (*a*) lack of proper organization on the part of the plaintiff, (*b*) lack of capital, (*c*) lack of business experience, (*d*) inattention to business, (*e*) misrepresentations to customers, (*f*) inability to fill orders, and (*g*) furnishing bad powder. (*h*) The record is full of evidence to the effect that the de-

fendants in no wise interfered with any of the customers of the plaintiff, in no wise induced any of them to leave the plaintiff. (*hh*) Of the one hundred and thirty customers that were examined, not one testified that the defendants, or any of them, induced such customer to leave the plaintiff, but on the contrary, they all testified that they left for other and legitimate reasons, disconnected with anything except the failure of the plaintiff to satisfy them. (*i*) The record is further full of testimony to the effect that during all the period of the existence of the plaintiff company a very large number of independent competitors sprang up with the consequent result of lower prices; (*j*) that prices were decreased not by any action of the defendants, but by the action of these new concerns including the plaintiff, and in fact under the leadership of the plaintiff, which was one of the first to be established; (*k*) that during the whole period instead of increasing its hold upon the trade and the volume of its trade, the defendant lost trade and the volume of its trade continually decreased."

It would seem that if there were "hundreds if not thousands" of pages of the record to support the foregoing, counsel could easily have pointed out some portion thereof. That they have not done so is evidence that they are giving expression only to their opinion and do not care to submit that opinion to the test of the facts.

We do not know of, and do not believe that defendants' counsel can point out, any evidence that will support the statements made at (a), (b), (c), (d), (e), (f), (g) and (j.)

As to the statements at (h) and (hh), the

only evidence that there is to support them is fully discussed in our former brief at pages 270-276, and it is based solely on the hypothetical question which is set forth as the 24th Assignment of Error, from which it appears that the answers all show that none of the witnesses had the slightest comprehension of the "inducements" alleged in the Declaration, and which alone formed a proper basis for the question. That we are correct in this position is also shown by what defendants say at page 107 of their brief, namely, that in answer to their demand for a bill of particulars, plaintiff furnished them with "the name of about 311 different concerns, mostly coal-mining operators scattered all over the Middle West, as being those so *alleged in the Declaration* to have been induced to leave the plaintiff *by the methods indicated,*" and they again repeat that they took the depositions of something like 130 of them "for the purpose of demonstrating the fact that they were induced to leave the Plaintiff Company *as alleged* in the Declaration."

The statement that 130 of plaintiff's customers were examined by the defendants is very reckless and inaccurate, for the record shows (pp. 2065-2069) that only 79 such customers were examined, which leaves the "inducements" which influenced 232 of plaintiff's customers unaccounted for, even assuming that the assertion is correct that "not one" of the 79 testified that he was induced to leave plaintiff by the defendant. Their own testimony, and other undisputed evidence in the record, shows that the trade of many of these witnesses amounted to from two to twelve kegs of powder each. That their trade was in-

finitesimal and of no consequence so far as plaintiff's business was concerned, is not questioned. Furthermore, what the "other *legitimate* reasons" were, which it is said these witnesses testified actuated them to abandon plaintiff, is not pointed out and cannot be pointed out. Some of those whose trade was important testified to the presence of the very "inducements" alleged in the Declaration, namely, that they were tied up by contracts with the defendants, or that they received lower prices from the defendants, or that they were influenced by the demands of the miners—as will be seen by reference to the plaintiff's former brief.

As to (*i*) and (*k*), the contention of the defendant Du Pont Company, was that after it succeeded to the Gun Powder Trade Association, those members of that association whose full legal title it did not acquire, immediately *entered into competition with it,* as a result of which prices were reduced and its volume of trade fell off. That this was a fallacious and entirely unsupported plea is shown by the facts as set forth in our former brief at pages 113-114. Furthermore, one needs but to read the testimony of the defendants' witness, Mr. Barron, the head of the American Powder Company, which was one of the "Fay Companies" and a member of the Association until its final dissolution. He claimed on his direct examination that his company was an active competitor of the Du Pont Company, and yet on cross examination it appeared that nearly all the customers his company ever had were such as it had had for twenty or thirty years (Trans., pages 1968-1972). In-

stead of showing that his company was a competitor of the Du Pont Company, he confirmed what is pointed out in our former brief at page 105 relative to the Du Pont Company "respecting" the contract trade of all former members of the Gun Powder Trade Association, after that association was dissolved.

The statement made at (*j*), that "prices were decreased not by the action of the defendants, but by the action of these new concerns, including the plaintiff, and in fact under the leadership of the plaintiff", is already partially answered by the discussion in our former brief at pages 87-94, but it is reiterated so often in the defendants' brief without pointing out any evidence in the record to sustain the charge, that we feel it our duty to call attention to the following additional facts as shown by the record:

The Price-Cutting Charge.

It was contended at the trial that plaintiff could not be heard to complain of the conduct of the defendants, because it was itself the "leader in price-cutting", and that it "began to cut prices" as soon as it entered the explosives field.

Mr. Patterson, a Vice-President of the Du Pont Company, testified that plaintiff "started the price-cutting", but upon further examination gave the following explanation as his only reason for so testifying (Trans., pp. 189-190):

> "Q. Now, you stated a while ago that from your best recollection the Buckeye Company

first cut prices. Is that correct? A. That is my impression.

"Q. Well, now, upon what do you base that impression? A. *I do not see how any concern can start in business and get along, except by cutting prices. I have no specific case in mind.*

"Q. You have not mentioned any amount in which the Buckeye Company cut prices? A. Not at present.

"Q. Then, your answer was purely an imaginary one? Is that right? That they might have done it, if they wanted to, in order to get business? A. I do not see how it could get business if it did not.

"Q. Now, is that the sole reason that you stated that the Buckeye Company was the one which started the price cutting, in order to get business? A. That is my impression. *I have no specific case in mind.*"

Nor do counsel attempt to deny the correctness of the report made by Mr. Brewster, an official of the Du Pont Company, as pointed out in our former brief at pages 91-92, which shows that plaintiff's prices were higher than those of the defendant, and that it was this report that precipitated the general cut made by the Du Pont Company to 95 cents per keg, which immediately followed, and which price Mr. Bumstead, the head of the competitive division of the Du Pont Company, told him "was low enough to get the business" (Trans., p. 2402, fol. 7206).

The references given to the record by no means exhaust the record that might be cited to show that from the moment that plaintiff began to solicit business down to the time when it was compelled to close its doors, the defendants pursued a relentless policy of underbidding.

But assuming, for the purpose of the argument, that the plaintiff did "cut prices," the first pertinent inquiry is—**Whose Prices Did Plaintiff Cut?**

Were they the defendant's prices?

The evidence shows that the only "fixing" or "cutting" of prices was done by the Du Pont Company. Whenever they saw fit they established such prices as they pleased, and kept them secret. If a competitor, by chance or by design, happened to make a price different from the price thus secretly established, he was a "price-cutter."

The testimony of the defendants own witnesses shows that the Du Pont prices were "fixed" by the Sales Board of the Du Pont Company, upon special application by an agent or salesman, stating the reasons therefor (Trans., p. 385). The only violation of this rule was the general 95-cent price which was made in May, 1905, and discontinued October 14th, 1907 (Coyne, p. 380, fol. 1138), in an effort to drive the plaintiff out of business.

The defendants also endeavored to make a distinction between "price-cutting" and "price-meeting." If plaintiff reduced its prices to its customers, this was denominated "price-cutting," but if the Du Pont Company reduced its prices to its customers, this was called "price-meeting."

In other words, the defendants would have it appear that they never varied from their prices except to *meet* lower prices which the plaintiff fixed. When confronted with numerous violations of this theory, their answer was that this was their *"policy."* (T. C. Du Pont, Trans,, pp. 1904, 1908, fols. 5712-5724; P. S. Du Pont, pp. 1952-3, fol. 5857; Haskell, pp. 1766, fols. 5296,

1935, 5803; Moxham, p. 1946, fol. 5837; Barksdale, pp. 1913, 1920, fol. 5738; Patterson, p. 185.)

Plaintiff's Exhibit 1248, known as the "95-cent price list" (discussed in our former brief at p. 92), which gives a list of 445 instances of cuts not based upon any competitive bidding, is an eloquent refutation of this pretense. When Mr. Haskell was confronted with instances in which the record showed a cut *below* plaintiff's price (Trans., pp. 1804-1805), he at once took refuge behind the claim that the Du Pont Company cut the price "if a competitor was either *making* a cut, or was *ready* to make it" (Trans., p. 1804, fol. 5412).

In our former brief we also pointed out that no open *price list* of explosives was ever issued in the history of the trade until in October, 1907—after the 95-cent price had accomplished the work for which it was designed by driving plaintiff out of business—thus proving the wisdom of Mr. Bumstead's foresight that it was "low enough to get the business."

Mr. Waddell testified that he would not have dared to cut a price if he knew it (Trans., page 1075), and the defendants have not pointed to any portion of the record which shows that he did know, nor could have known, what the Du Pont prices were. He was extensively cross-examined as to the prices at which the plaintiff sold powder to certain of its customers, as shown by its books. In many instances he was asked the following or a similar question: "What was the Du Pont price to such customer at that date?" and invariably he replied substantially as follows: "I do not know;" "I knew nothing of Du Pont prices only what customers told me;" "the

Du Pont prices were secret" (Trans., pp. 1482-1516).

However, we wish it distinctly understood that plaintiff stands upon the broad principle that the defendants had not the right, legally or morally, to establish prices to which the plaintiff was bound to conform; and that so long as the plaintiff used no unfair or improper methods in carrying on its competition for business, it had a legal and moral right to make such prices as it might deem proper without regard to the prices fixed by the Du Pont Company.

If this is not so, where did the defendants acquire the right, legal or moral, to establish prices for explosives to which all others must conform?

To uphold their contention that they have such a right would be in effect to give them the power to continue the monopoly, which they built up and long maintained through the Gunpowder Trade Association, and thus to nullify the Anti-Trust laws. For is it not self-evident that to give the Du Pont Company the right to *establish* prices to which all other manufacturers must conform, is, in effect, to perpetuate its monopolistic control, and is in fact to confirm it as a legal monopoly.

In the National Cotton Oil Co. vs. Texas, 197 U. S., 115, 129, it was said:

> "It is certainly the conception of a large body of public opinion that the control of prices through combinations tends to restraint of trade and to monoply, and is evil. The foundations of the belief we are not called upon to discuss, nor does our purpose require us to distinguish between the kinds of combinations or the degrees of monopoly. It is enough to say that the idea

> of monopoly is not now confined to a grant of privileges. It is understood to include a 'condition produced by the acts of mere individuals.' Its dominant thought now is to quote another, 'the notion of exclusiveness or unity;' in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.'"

The absurdity of the price-cutting charge, even if proved, as furnishing an excuse for the conduct of the defendants, is shown by the mere statement of the facts established by the evidence that the plaintiff's plant had a capacity of 250,000 kegs per year, and its operations were limited by freight rates, to a few of the central states; while the plants owned by the defendant Du Pont Company alone had an annual capacity of 8,250,000 kegs in 1904, and its operations covered the entire United States and some foreign countries.

It is perfectly apparent that the Du Pont Company could have entirely ignored the plaintiff as a competitor, without affecting its trade in any appreciable degree, and that it would have done so but for its determination not to permit the plaintiff to live. Monopoly was the *sole object* of the defendant in its effort to deprive the plaintiff of enough business to keep its mills in operation.

This policy was well-voiced by their counsel on his cross-examination of Mr. Waddell (Trans., pp. 1157-1158), where the theory was advanced that because the Associated Powder Companies

feared that, if a given competitor was allowed to obtain a fair share of the trade, and to conduct its business at a reasonable profit, it might have been able to get *"an ever increasing share"* of trade, until it had been selling its *full output,* and as a result "some other person would have come along and built three or four mills and gradually these Associated Companies would have had nothing left." (Trans., p. 1158, fol. 3474.) Mr. Waddell's answer to this theory is very much in point. (*Ibid,* fols. 3471-3472):

> "If the Associated Companies had allowed an independent to live, allowed them a fair share of the business, a small share of it, of the growing business of the country, they wouldn't have had this fight; but it wasn't the policy of the Associated Companies in any of the fights; they wanted to rule or ruin."

The Quality of Plaintiff's Powder as an Issue.

On the examination of Mr. John B. Falcetti, a user of about 24,000 kegs per year, called as a witness for the defendants, the following question was propounded by plaintiff's counsel (Trans., p. 2339, fol. 7016):

> "Q. What did you find was the result of the powder so far as its quality is concerned?

Thereupon the following colloquy occurred:

> "Mr. Katzenbach: That is objected to as incompetent, irrelevant and immaterial, *the*

issue in this case not being a case of the merits or demerits of the Buckeye powder.

"Mr. Abbott: If you will stipulate that I will not ask another question.

"Mr. Katzenbach: *I will say that that is my understanding of the law.*"

The answer of the witness was given as follows:

"A. The Buckeye powder was all right. It done the work."

Notwithstanding the quality of plaintiff's powder as a material issue was thus *expressly abandoned*, the contention is now made by Defendant's counsel in their brief (without, however, pointing to any portion of the record to sustain it), that plaintiff "furnished bad powder" to its customers (Brief, p. 8); and that Mr. Waddell's motives in establishing his plant might account for "the poor quality of powder that he made therein" (p. 51).

Many witnesses who had used Buckeye powder testified that they found that it produced better results than Du Pont powder, but on account of contracts with the Du Pont Company, or the influence exerted with miners and other reasons not connected with the quality of the powder, they could not purchase it. (See testimony of R. E. Lewis, Trans., pp. 631-632; of Robert Morton, Trans., pp. 643-644; of Samuel Stephens, Trans., p. 461; of Thomas Jeremiah, Trans., pp. 522-523; of David Harris, Trans., p. 1577; of Seth Whites, Trans., p. 1587, fol. 4761; of Charles A. Party, Trans., pp. 1568-1569; of David S. Thrush, Trans., p. 1583; of William D. Evans, Trans., pp. 1590-1591.)

One customer used nearly 50,000 kegs (C. G. Thurston, Trans., pp. 510-513); another used nearly 28,000 kegs (Thomas Jeremiah, Trans., pp. 522-523).

These and many other witnesses show that wherever a contest was made between Buckeye powder and Du Pont powder the results proved that an average of about 18 tons of coal per keg was obtained with Du Pont powder, and an average of from 22 to 23 tons per keg was obtained with Buckeye powder.

Some of the defendants' witnesses testified that they did not get satisfactory results from *every shot* they made. But they also testified that every kind of powder, including DuPont powder, *at times proved unsatisfactory,* and did not produce good results from every shot.

But even if it were true that plaintiff did lose the trade of every person whose testimony was produced on account of any dissatisfaction with the quality of its powder, *the total amount of the annual business which would have come from this source,* if plaintiff had acquired it all, would not have amounted to 5,000 kegs. It is apparent that a loss of that amount of trade would have had no appreciable effect on a plant with a capacity of 250,000 to 300,000 kegs per annum. We think the Court will agree with the contention that if plaintiff's retirement from business was due to the loss of its customers by reason of the poor quality of its powder, that fact cannot be established by showing that *some* customers were lost on this account. It must be made to appear that these customers were sufficiently numerous and important to have made a de-

cided impression on plaintiff's business. This was not done. Defendants concede that plaintiff furnished them with a list of 311 customers, and even if it were true, as counsel for defendants state, that they produced more than 130 of them, who said that they declined to do business with plaintiff on this account, *there would be 181 customers still remaining to do business with it,* but as we have above pointed out there were only 79 such customers who were examined by defendants—thus leaving 232 unexamined.

Furthermore the evidence shows, as has already been pointed out in our former brief, that there were consumers of vast quantities of powder who were willing to become plaintiff's customers, and the quality of its powder was not the deterring motive, but the acts of the defendants were (see Brief, p. 291).

POINT I.

The direction of a verdict in favor of the Eastern Dynamite Company and International Smokeless Powder Company.

(See former brief, p. 45 *et seq.*)

But defendants make several important *admissions* with respect to the action of the Court in directing a verdict in favor of the Eastern Dynamite Company and International Smokeless Powder Company, which, as we view it, in effect concedes this assignment of error. One of these

is contained in the following extract (Defendants' Brief, p. 11):

> "The plaintiff-in-error cites a number of cases on pages 33-37 of its brief, which go to the point that a conspirator may in some instances be liable for the acts of his co-conspirators. *This proposition probably could not be successfully denied,* nor is it necessary to deny it. The Court here did not hold that one conspirator is not liable under proper limitations for the acts of his co-conspirators, but held that there was no evidence *that either of these corporations was a conspirator,* and it was on *that ground* that the verdict was directed in their favor."

In refutation of the above statement that the direction of the verdict was on the ground that there was "*no* evidence that either of these corporations was a conspirator," it is sufficient to point to what the Court itself says, namely (see assignment No. 3):

> "The evidence, however, fails to support any *participation* by the Eastern Dynamite Company and the International Smokeless Powder Company, and my instructions to you are that you return a verdict of no cause of action in their favor."

The proposition set forth at pp. 33-37 of our brief, which it is admitted above "probably could not be successfully denied," is (a) that every conspirator is liable for all the overt acts of his co-conspirators, whether he actually "participated" in them or not; and (b) that the evidence in this case shows that the defendants Eastern Dynamite Company and Smokeless Powder Company were members of the con-

spiracy, and was for the jury to weigh and pass upon.

This evidence, as collated in our former brief, and which the jury never had an opportunity to consider in so far as it applies to these two companies, conclusively shows that they both were co-conspirators with the Du Pont Company in *maintaining a monopoly* of the explosives industry. It is practically the same evidence upon which Judge Lanning so found as a fact, and based the decree of dissolution in the Equity case.

The argument of the defendants' brief is that because the Eastern Dynamite Company and the International Smokeless Powder Company were not parties *in name* to the Gunpowder Trade Association, they could not possibly have been parties to the conspiracy. The co-operative methods described by us in our former brief at pp. 64-84 are ignored.

They also say (Brief, p. 23), that the "Haskell-Fay" agreements, which marked the beginning of the combination of the dynamite interests and the black powder interests (see our former brief, p. 68), were "abrogated long before plaintiff went into business." No reference is made, and none can be made, to anything shown in the record to support this statement. The record shows that the agreement was, by its terms, to continue until three months' notice of discontinuance was given (Trans., p. 2788, fol. 8362). The record does not disclose that any such notice was ever given. It did in fact continue until the dissolution of the Gunpowder Trade Association in June, 1904, and was succeeded by the "Sullivan-Fay" agreement—which related solely

to dynamite (Trans., pp. 1963-1964)—and which continued the relationship between the same interests represented by the "Haskell-Fay" agreements until March 31, 1903—Sullivan representing the Du Pont Company and Mr. Fay representing the same interests he did under the "Haskell-Fay" agreements. (See references in our former brief, p. 75.) The plaintiff was organized in February, 1903, and shipped its first powder in September, 1903; therefore it will be seen that there is no foundation whatsoever for the assertion that this agreement was abrogated before planitiff went into business.

Further assertions that other agreements were abrogated before plaintiff came into being are made by counsel for defendants (Brief, p. 23). But it will be observed that not a single citation to the record is made to support these assertions. It will, therefore, be unprofitable and useless to give further attention to them.

On the question of stock ownership and control of the Eastern Dynamite and Smokeless Powder Companies as supporting plaintiff's claim of unlawful combination, we call attention to the fact that in the Standard Oil and Tobacco cases, the monopolies were built up and maintained largely by stock ownership and control of many subsidiary corporations. The classification of the various corporations proceeded against in the Tobacco Case, as shown by the recital at 221 U. S., 143-147, might properly be followed as the classification in the present case: the Du Pont Powder Company (like the American Tobacco Company) "because of its dominant relation to the *subject matter* of the controversy

as the *primary* defendant"; the Eastern Dynamite and the International Smokeless Powder Companies "because of their relation to the controversy as the *accessory*", defendants and the 110 subsidiary corporations named in the Declaration, and shown by the evidence, to be co-conspirators. This Court considered the power exercised by the primary defendant, the American Tobacco Company, over the accessory and subsidiary corporations, whether due to stock ownership and control, or other facts, in relation to the *whole* situation. Chief Justice White, at p. 237, said:

> "Our conclusion being that the combination *as a whole*, involving all its *co-operating* or *associated* parts, in whatever form clothed, constitutes restraint of trade within the first section, and an attempt to monopolize or the monopolization within the second section of the Anti-Trust Act", etc.

Admission that Foreign Agreement Was an Agreement in Restraint of Trade, and that the Eastern Dynamite Company Was a Party to It.

After having said that "the Foreign Agreement is not in evidence", and that the summary of its provisions as set forth by us at pages 51-52 of our former brief "is most exaggerated" —not, however, pointing out any such exaggeration—counsel for defendants make the following admission concerning the provisions of this agreement and its purpose and effect, which

establishes all that is necessary to be established in order to show that the Eastern Dynamite Company was a party to the unlawful combination to control the explosives industry, and that it was error to direct a verdict in its favor. We quote their interpretation of the purpose and effect of the Foreign Agreement as stated by the defendants in their brief at page 22:

> "It seems to have related to a *division of territory*, and to have been to the *effect* that the European factories would not build plants or sell certain products in the United States, and a reciprocal provision was contained".

Also, on the same page:

> "It is difficult to see how the plaintiff could have been harmed by an agreement which resulted in keeping a lot of foreign companies from manufacturing and selling black powder in the United States."

This concedes the essential fact relating to the Foreign Agreement, namely, that it was an agreement between certain "American Factories"—of which the EASTERN DYNAMITE COMPANY was one—and certain "European Factories", whereby the explosives trade of the world was divided up and restrained and was, therefore,

> "a contract in restraint of trade and commerce among the several states and with foreign nations",

and prohibited by Section 1 of the Sherman Act.

But with marked inconsistency counsel for defendants follow the above with the statement that plaintiff cannot complain of this agreement because "it was abrogated *prior* to the time that plaintiff herein was entitled to collect damages."

The defendants' plea of the Statute of Limitations cut off plaintiff's claim of all damages suffered prior to Sept. 18, 1904 (Trans., p. 2507, fol. 7521), and the undisputed evidence is that the Foreign Agreement was abrogated and cancelled in 1906 (T. C. Du Pont, Trans., p. 214). So that, whether the ruling based upon the Statute of Limitations was correct or not, the "Foreign Agreement" operated for nearly two years after the plea became effective.

On page 16 of their brief, the defendants say that the Du Pont International Powder Company, which is the company owning the stock of the International Smokeless Powder Company, "was engaged exclusively in the manufacture of smokeless powder". They do not point to anything in the record to sustain this statement, and we know of nothing.

Defendants also contend that the direction of a verdict in favor of the Eastern Dynamite Company and International Smokeless Powder Company was harmless, because the evidence, in so far as it related to the Du Pont Company, was submitted to the jury, and that defendant was exonerated by the verdict. They say (pp. 28-29):

> "To all intents and purposes these two corporations stand in the position of two sureties sued in connection with the principal for whom they are sureties."

And they argue that sureties cannot be held unless there is a verdict against their principal.

Without stopping to discuss this proposition as applied to sureties, we would say that this is the first time we have ever known of the doctrine

of principal and suretyship being invoked by co-conspirators in the commission of crime to avoid the legal consequences of their acts.

Defendants cite Portland Gold Mining Company vs. Stratton's Independence, 158 Fed., 63, as an authority to support their contention that these two companies were discharged of liability from further prosecution. But the injuries complained of in that case resulted from a trespass and grew out of *contract* obligations. The rules governing contract liability do not apply to criminal conspiracy.

It is perhaps sufficient to point out, as was said by this Court in Bigelow vs. Old Dominion Copper Company, 225 U. S., 11, 132, that

> "In many cases this Court has held that a judgment without satisfaction against one of two joint trespassers is no bar to another action against the other for the same tort. The common law imposes upon a joint tort-feasor the burden of bearing the entire loss which he, in co-operation with another, has inflicted. The injured person may sue those who co-operated in the commission of the tort together, or he may sue them singly. He may recover against less than all if he sue them jointly, and may have a judgment for unequal sums against all who are joined in the suit. Or, if he sue one such wrong-doer and recover judgment, he is not estopped from suing another upon the same facts unless his first judgment has been fully satisfied."

Furthermore, whether the defendant Du Pont Company has been exonerated depends altogether upon whether the question of its liability was properly submitted to the jury—and that is one of the issues before this Court at this time.

POINT II.

In re the purchase of plaintiff's plant by Olin, and the inducements given by the defendants.

(See our former brief, pp. 109-130.)

In order to overcome the effect of the plain and uncontradicted evidence of Mr. Olin himself, which establishes a direct ownership in the plant which he purchased from plaintiff at its instance, by the Du Pont Company, counsel try to show that Mr. Olin did not mean what he said (Brief, pp. 65-66). "His answer is somewhat confused", they say, and he "had in mind" to say something quite different from what he did say—that is, the thing which they wished him to say. The plain language of his testimony does not need any construction, and the effort of counsel to place a construction upon it so widely different from what he said, is a confession that the position taken by the plaintiff as to the meaning and effect of his testimony is correct.

Furthermore, on page 66, in order to avoid the effect of the agreement between Mr. Olin and the Du Pont Company, whereby that company agreed to purchase from 75,000 to 100,000 kegs of powder per year, to be manufactured by him at plaintiff's plant, which was his inducing motive to purchase the plant, counsel say (p. 66):

> "It further appears that a month or so after Mr. Olin and Mr. Lent purchased this property, the Du Pont Powder Company bought some powder manufactured there,

this for the reason that it had had an explosion in one of its western plants."

Counsel do not cite any portion of the record to sustain this statement, and we know of none such.

In answer to our contention that the Du Pont Powder Company shared some of its customers with Olin after he purchased the plant, counsel say: "There is not the slightest evidence in the record to substantiate any such statement." Since they do not deny the correctness of our references to and quotations from the record at pages 125-127 of our former brief, we can only conclude that the above is merely an expression of their own personal views.

POINT III.

The order requiring plaintiff to elect between Sections 1 and 2 of the Sherman Act.

(See plaintiff's former brief, pp. 131-143.)

Referring to Assignment of Error No. 4, we find the following language at page 34 of defendants' brief:

> "It is therefore apparent that the plaintiff is basing his contention at this stage of the proceedings upon the proposition that his declaration is bad. He is maintaining that his declaration consisting of only one count, *does, as a matter of fact, contain two causes of action,* and that he ought to have been allowed to avail himself of both those causes

> of action before the jury. In order words, he is forced to the position, not only that his declaration is the *subject of duplicity,* but that *it is properly so,* and he can take advantage of the duplicity that is therein contained."

And again at the bottom of the same page this statement is repeated and authorities are discussed to sustain a contention that nobody disputes, namely, that where separate causes of action are combined in one count election may be required.

It is difficult to understand the motive of counsel in making statements so entirely wide of the facts, because at page 41 of their brief they make the following directly contrary statements:

> "The plaintiff endeavors to escape the situation in which it finds itself by maintaining that a cause of action for damages under the Sherman Law is based entirely upon Section Seven of that statute. That, therefore, in any one count any number of offenses can be relied upon, whether they are under one or both of the first two sections of that act, and it is stated that to consider each separate act as constituting a cause of action would make it necessary to formulate a separate count for every separate overt act or step in a conspiracy as a separate cause of action."

In view of the position taken by plaintiff in its brief (at pages 135-143), namely, that plaintiff's right of action is given by Section 7 of the Sherman Act, *and not by Section 1 or Section 2;* and that Section 7 does not distinguish between things that are declared unlawful by Section 1 and those that are declared unlawful by Section 2; but that

it gives plaintiff a right to recover for such injuries as it may have suffered "by reason of *anything* forbidden or declared unlawful by *this act;*" and that this right constitutes a *single and indivisible* cause of action.

The controversy in the Standard Oil and Tobacco Cases involved both Sections 1 and 2 of the Anti-Trust Act, and yet, the bill in each case presented a single cause of action covering both sections. It may be assumed from the well-known intensity of the contest in those cases and the ability of the counsel on both sides, that if the contention is correct that the subject of each section requires a separate count, it would have been discovered and the question raised at that time.

It is of course beyond question that Sections 1 and 2 cover different *subjects:* "There could be no doubt," said Chief Justice White in the Standard Oil Case (221 U. S., 30), "that the sole *subject* with which the first section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the *subject* with which the second section is concerned."

But that these two *subjects* constitute separate and distinct *causes of action* which must be declared upon in separate counts—as the defendants so strenuously insist—has never been held by any Court except in the case of Rice vs. Standard Oil, which is exclusively relied upon by defendants. This case has, however, been virtually overruled by this Court, and is contrary to the rule laid down in numerous cases, as pointed out in our former brief at pages 134-138.

All the cases there cited were decided after the Swift case, and everyone has taken a contrary view to that taken in the Rice case.

Furthermore, the Rice Case was based upon the New Jersey practice. The provisions of the "Conformity Act" (U. S. R. S., 914), require that the Federal Courts shall conform to State practice "as near as may be," and "in like cases" only. It has been held in many cases, and well stated in Hills vs. Hoover, 220 U. S., 329, that:

> "This section was not intended to require the adoption of the State practice where it would be inconsistent with the terms or *defeat the purposes* of the legislation of Congress. * * * It follows that where the State statute, or *practice* is not adequate to afford the relief which Congress has provided in a given statute, resort must be had to the power of the Federal Court to *adapt its practice* and issue its writs and administer its remedies so as to enforce the Federal law."

In Ware-Kramer vs. American Tobacco, 178 Fed., 117, the Federal Courts began to adapt themselves to the new rules of pleading prescribed by the Supreme Court. It is well said on p. 125:

> "The evil at which this statute is aimed is of national importance, and the remedies provided for its punishment and repression should not be restricted by technical and narrow rules of pleading. If the plaintiff, in an intelligent way and by 'a connected story,' sets forth his grievance, he should not be turned away from the Court, or his pleading so mutilated, by striking out more or less essential averments, as to embarrass him and unduly limit the scope of his proof when he comes to trial."

In addition to the authorities already cited, we desire to call attention to what Judge Carpenter said on this question of duplicity, when the Swift Case was before him (188 Fed., 92, 97):

> "The objection is not sound. The crime charged is a combination in restraint of trade. Such a combination may design to accomplish its object in many different ways, and the enumeration of the various means adopted does not render the indictment bad for duplicity. Duplicity in an indictment means the charging of more than one *offense*, not the charging of a single offense committed in more than one way. Duplicity may be applied only to the result charged, and not to the method of its attainment. Anderson vs. United States, 171 U. S., 604; Connors vs. United States, 158 U. S., 408."

The general rule as many times applied to civil actions for conspiracy is thus stated in 8 Cyc., 676:

> "Specific acts done to effectuate the conspiracy may be set forth and are not to be considered as constituting several causes of action, although they may be different in their particular character, were done at different times, and defendants do not all claim to be interested in, or benefitted by each of them, or in the same degree as to any of them."

POINT V.

Mr. Waddell's alleged motives as an issue.

(See plaintiff's former brief, pp. 157-168.)

Counsel for defendants have seen fit, all through this case, to make a personal attack, not only upon Mr. Waddell as plaintiff's principal witness, but upon stockholders who have appeared as witnesses, or who have sought in any way to protect their interests through this proceeding.

The personal attacks upon Mr. Waddell have known no bounds; contemptuous epithets and insinuations at the command of counsel have been thrown at him, and yet with his entire history and record in the defendants' hands for a period of 21 years, they were unable to uncover a single fact involving his integrity.

At many places in defendants' brief, they renew these personal attacks and assail his motives and conduct by innuendo and assertion, but do not refer to the record to support their charges. These attacks culminate in the following amazing summary at pages 123-124, with not a single reference to the record. (The parenthetical notations are ours):

> "A fair reading of this record shows that (a) Mr. Waddell, a man who had been a trusted employee of the defendant for twenty years, (b) who had been a large participant, if not an originator, of many of the methods in the black powder business concerning which he complained, (c) after having observed the successful enterprise of one of his

assistants in building a powder mill and selling it out to the defendants at a profit after having demoralized the defendants' trade, undertook to emulate such example, fully convinced, as he told Mr. Rice, that he would not be required to manufacture powder, but would engage in the business of manufacturing prices. Under such circumstances he (d) built a flimsy mill, (e) began to cut prices, (f) had no money, (g) no experience as a powder manufacturer, (h) no integrity, (i) manufactured powder that could not be used, (j) failed to furnish that powder, such as it was, according to his contracts, (k) devoted his time to attacks upon the defendant rather than to the advancement of his own business, and eventually reaped the logical conclusion of such methods in coming to a point where he was obliged to sell his business to a man who did know how to run it and who (1) immediately upon the acquisition thereof, rebuilt his plant and made real powder and in a measure achieved some success with the enterprise. (m) Further than this, a fair reading of the testimony of Mr. Waddell, whose testimony contains the chief evidence relied upon by the plaintiff, will show that Mr. Waddell stood before the jury entirely discredited in *everything* he had testified to and largely from correspondence and documents signed by himself.

(n) We submit that if an enormous verdict must be insured to *such a plaintiff* in order to save the Sherman Law from annihilation it would be much better that such annihilation should ensue, than that such a measure of encouragement should be afforded to every illegitimate enterprise that sees fit to prey upon the community."

Assuming that all these statements are true

they can avail defendants nothing as a legal proposition; for as we pointed out in our former brief at pp. 157-168 the right of the plaintiff to recover for injuries suffered at the hands of the defendants cannot be affected by the knowledge which Mr. Waddell had gained as an employee of the Du Pont Company, concerning their unlawful policies and practices, nor the motive which controlled him in entering into the manufacture of powder.

If these charges and insinuations were supported by references to the record we would be content to let the Court judge of their accuracy without comment. Since, however, Mr. Waddell is now dead and unable to defend himself, we cannot permit them to go unanswered, for they constitute, as they no doubt were intended to constitute, an attempt to influence the judgment of this Court—as they have no doubt already influenced the jury.

Furthermore, the charge of "no integrity" seems to be a particularly ill-fitting uncalled-for and malicious effort to blacken the memory of a dead man, for it is now made for the first time.

We will therefore consider them as briefly as possible:

(a) It is true that Mr. Waddell was a trusted employee of the Du Pont Company for over twenty years, and we challenge the defendants to show that he ever betrayed the trust. The record shows that during this period he handled more than ten million dollars of the money of his employers and did not default in a single cent (Trans., p. 929). Even after the death of Eugene Du Pont in 1902, under whom he had served most

of this time, Mr. T. C. Du Pont, the new head of the Du Pont interests, transferred him to Wilmington and made him General Sales Agent for the United States, increased his salary from $9,000 to $10,000 the first year, $11,000 the second year and $12,000 the third (Trans., pp. 827, 1417-1418), and assigned him to perform a large part of the duties which he (Mr. Du Pont) was officially called upon to perform as a member of the Gunpowder Trade Association (Trans., 718-720).

(b) The record does not show that he was the originator of any of the policies or practices complained of, except in the sense that, as an employee, he was called upon by his employers for advice, and gave it; and was instructed to carry out their policies, and obeyed instructions (Trans., pp. 925-926).

(c) The files and records of the defendants during the whole period of Mr. Waddell's activities as the employee of that company were searched for all sorts of letters or other communications which by some possibility might be given a construction which would uphold the idea that he had long been plotting to enter the powder business and reap for himself some of the profits which had been made by others.

The record discloses nothing but the most devoted loyalty to the interests of his employers in everything he did and said. The policy of consolidation and absorption which had been going on for so long finally resulted in taking most of his trade away from the Cincinnati office, which he managed, and when he realized

this he reached the conclusion that his employers were about through with him, and began to think about establishing a powder business for himself. (Trans., pp. 1405-1410; also 1416.)

This was held up as an offense against good morals—a proposition which we confess we have never been able to understand except upon the theory of the "divine right" of the Du Pont Company to monopolize the explosives industry.

We have already discussed in our former brief (page 160) the alleged conversation as testified to by Mr. Rice. (See also Trans., pp. 1401-1404, 1455.)

(d) The record is not in dispute that plaintiff's plant cost over $118,000, and the defendants' own witnesses (including Mr. Olin) all admitted that the buildings were substantial and that the plant was equipped with up-to-date machinery, and until counsel point out something in the record to support their assertion that Mr. Waddell built "a flimsy mill", the statement is not worthy of further attention.

(e) The statement that plaintiff "began to cut prices" has already been shown to be wholly unsupported. (See *supra*, p. 12.)

(f) The record shows that every dollar of the entire capital stock, namely, $100,000, was paid in in cash; and that plaintiff had the credit to, and did obtain its necessary working capital as required (Trans., pp. 938-939).

(g) The charge that he had no experience as a manufacturer of powder is true only in the sense that he had never before owned and controlled a

powder plant. The evidence shows that he was well versed in the art of powder making (Trans., p. 1518) and was employed by Olin to operate the plant for the first year after its sale at a salary of $12,000 per year.

(h) The charge that he had "no integrity" is a malicious libel, without the remotest vestige of truth, and we challenge the defendants to point to the record to support it. It is almost beyond belief that an honorable and faithful servant, who devoted twenty-one years of the best period of his life to the service of Du Pont Company, should be subjected to such unwarranted and altogether unfounded attacks upon his integrity. We have already pointed out in our former brief (pp. 161-165) some portion of the record which flatly contradicts this statement. We also refer to Plaintiff's Exhibits 42 and 44 (Trans., pp. 2565 and 2570), where it is shown that Mr. T. C. Du Pont, representing the Du Pont interests, negotiated with Mr. Waddell with a view to joining him in the building of a powder plant, and where Mr. Du Pont says that Mr. Waddell's associations with the Powder Company had been "entirely satisfactory", and that because the Powder Company "does recognize the ability and appreciates the long and faithful service of R. S. Waddell", etc. (fols. 7694, 7710-7711), it desires to join with him in the enterprise.

These negotiations failed because it developed that the Du Pont interests desired to have stock control of the company, or its output, in such a manner that at any time they saw fit they could assume control of the business. This Mr. Wad-

dell did not care to do, and he discontinued negotiations, resigned from their service, went out and interested other capital, and conducted his business independently. The very men whom he had served so long and faithfully placed detectives on his track and followed him throughout the country as if he were a common criminal.

(i) The falsity of this charge is sufficiently pointed out, *supra*, p. 17.

(j) We know of no evidence to support the statement that plaintiff failed to furnish powder according to its contracts.

(k) That Mr. Waddell "devoted" his time to attacks upon the defendants is merely an epithet. There is no evidence whatever to that effect. That he gave as much of his time to *defending* the plaintiff from the attacks made upon its business by the defendants and their large corps of officers and salesmen throughout the country, as he could spare, is unquestionably true. When he found the plaintiff rapidly being forced into bankruptcy, he *fought back* with all the power and ability at his command. He first tried the publicity method, that is by trying to awaken the interest of the public, and especially the consumer, against the methods of the defendants; and finally filed a petition with the Department of Justice, charging them with violation of the Sherman Law, thus setting the machinery of justice to work to bring them to book, and aided the Department of Justice with all the evidence and influence which he could bring to bear. That he was justified is proved by the fact that the defendants were convicted in that proceeding.

It was not until he set about to bring the defendants to book and force them to suffer the penalty of their own offenses that he became an outlaw, in their opinion. Having accomplished this object, he turned his attention to securing the private redress guaranteed to him by the statute, and in this he has so far failed.

(1) The statement that the purchaser of plaintiff's plant "immediately rebuilt" it, is clearly at variance with the record. The evidence shows that no changes were made in the plant during the first year, except to install a new separator at a cost of not to exceed $1,000, for the purpose of making *sporting* powder, which had never been made at the plant before, and which, on account of the smallness of the grains, required a finer mesh to produce (Trans., pp. 2415-2417). And as to Mr. Olin being responsible for the success of the business because he was "a man who knew how to run it and made *real powder*", it is a sufficient answer to say that Mr. Olin employed Mr. Waddell himself for the first year, at a salary of $12,000, who had full charge of the business; that there was no change in the formula. Mr. Olin succeeded where the plaintiff had failed because the Du Pont Company and other allied companies became his principal customers, and purchased the greater part of his output and paid 90 to 95 cents at the mill, and assumed all the expense of carrying and transporting the same, which represented a good profit (Cryne, pp. 378-379). Furthermore, all opposition to the product of the mill among the miners and others, immediately ceased because there

was no longer any competitor interested in instigating such opposition.

Mr. Olin, as defendants' witness, on direct examination made the general statement that he had expended $100,000 on the plant *since he had bought it;* but on cross examination he could account for none of this expenditure during the first year, and was in fact unable to account for more than $10,000 or $12,000 of the amount *at any time.* Such of his expenditures as he did account for were for the purchase of *additional* land, the replacement of buildings and machinery destroyed *by explosions,* and the installation of a *keg making plant.* All this covered a period of *over four years* after he bought the plant and had nothing to do with the original plant (Trans., pp. 2019-2023).

(m) The statement that Mr. Waddell was "discredited in everything he testified to largely in correspondence and documents signed by himself" is one which, if true, it would seem only common decency would dictate should have been supported by some reference to the record. None was given and in our judgment, none is possible.

(n) The conclusion that it is better that the Sherman Law should suffer annihilation than that "such a plaintiff" should be encouraged to prey upon the community with its "illegitimate" enterprise, no doubt expresses the heartfelt sentiments of the defendants and all others similarly infected with the idea of monopolistic control by divine right, who do not care to be disturbed in their purpose to defy and break the laws of the land, and crush out opposition to their plans at

their pleasure. It has not been the policy of this Court heretofore to grant such fervent prayers from such sources, and we do not believe it will be in the future.

POINT IX.

Inciting opposition among the miners, against plaintiff's powder.

(See plaintiff's former brief, pp. 190-221.)

In regard to Assignment of Error No. 12, which relates to inciting of boycotts among the miners against plaintiff's powder, counsel for defendants (Brief pp. 68-83), make so many denials and assertions, without making citations to the record to support them, and also without questioning our references to the record, that it would be futile to attempt any specific answer to them. But we cannot refrain from expressing a word of caution against this method of attempting to influence the Court.

Admission as to Assignment of Error No. 13.

(See plaintiffs former brief, pp. 221-224.)

As to Assignment of Error No. 13, which is directed to the charge of the Court to the effect that plaintiff had a paid representative at the Applegate & Lewis mine while the test between

plaintiff's powder and Du Pont powder was going on there, the defendants make the following admission, which, in effect, concedes the error of the Court (Defts'. Brief, p. 83):

> "In reference to the statement that Mr. Alec Thrush was not present while this test was being made, the Court stated that the period was in dispute. It is also true that the period at which the test was made is *not definitely* established, and furthermore, the Court did not tell the jury that *this man* was present at the test, but simply stated that while the test was going on the plaintiff had a paid representative among the miners. This statement is perfectly true."

Counsel do not point out any part of the record which supports the concluding words of the above quotation. The record does not show, and so far as we know it has never before been intimated, that the plaintiff ever employed any other person to act for it in any capacity at the Applegate & Lewis mine, except Alec Thrush; and as pointed out in our former brief (p. 223), he himself testified that he was not there at the time of the test. So that it does not matter whether the period during which he was employed at the mine was in dispute or not, since if it appears that he was not there at the time of the test, then the instruction of the Court was wrong. If, therefore, "this man" was not present at the test, it is incumbent upon the defendants to point out who the man was that was present at the test, as a paid representative of plaintiff's powder—which of course they cannot do.

POINT XI.

The rejection of letters and statements of persons solicited to become plaintiff's customers.

(See former Brief, pp. 249-256.)

The defendants argue that because the letters and statements that the Court rejected were written or made by persons who were *not yet* customers of the plaintiff, but were merely being solicited *to become* customers, their motives for refusing to do so do not come within the rule laid down in Lawler vs. Lowe. (Defendant's Brief, pp. 89-91.)

But as we understand the decisions of this Court as pointed out in our former brief at pp. 292-294, it is just as unlawful to *prevent* a person from obtaining business, as it is to *destroy* his business. Therefore, to prevent a person from obtaining customers is just as wrongful as to cause his customers to abandon him, and the reasons given by consumers of powder for not becoming plaintiff's customers, when solicited, are just as relevant as their reasons would be if they were abandoning plaintiff.

In the Danbury Hat case, the contention was that statements made by a customer explaining his refusal to purchase hats which he had customarily purchased, are admissible if given in the ordinary course of business, when he is being solicited for orders, as an explanation of his act of refusal. Such evidence is admissible under well-established principles as part of the *res gestae* to explain an equivocal act, such as a dis-

continuance of patronage or employment, and to prove the state of mind which the defendants produced.

Elmer vs. Fessenden, 151 Mass., 361;
Hine vs. N. Y. E. R. R. Co., 149 N. Y., 154.

POINT XV.

Measure for damages.

(See plaintiff's former brief, pp. 278-279.)

On the question of loss of profits, the defendants cite Central Coal & Coke Company vs. Hartman, 111 Fed., 96, to sustain the action of the Trial Court in its instructions. (Defts'. Brief, p. 116.)

But in so far as the rule laid down in that case relates to damages sustained by one who has been *prevented* from carrying on business, it is in direct conflict with the decisions of this Court, beginning with the *Kissel* case, 218 U. S., 601, and the subsequent cases following the rule there laid down (cited in our former brief, pp. 292-295), to the effect that it is just as unlawful to *prevent* a person from engaging in business, as it is to drive a person out of business.

It would indeed be an empty privilege to extend to a person a *right of action* for injuries sustained by being prevented from establishing a business and making profits and then deny him the right to recover any damages because he

had no established business upon which to base an estimate of his loss of profits.

And yet, that is what Judge Sanborn held in the Hartman case, as the following clearly shows (111 Fed., 99):

> "He who is prevented from embarking in a new business can recover no profits, because there are no provable data of *past business* from which the fact that anticipated profits would have been realized can be legally deduced."

The fact is that the Hartman case was decided September 30th, 1901, and the Kissel case was decided nine years later—December 12, 1910—and if the rule there laid down by this Court is to be of any value whatsoever, then the Hartman case is not an authority.

Respectfully submitted,

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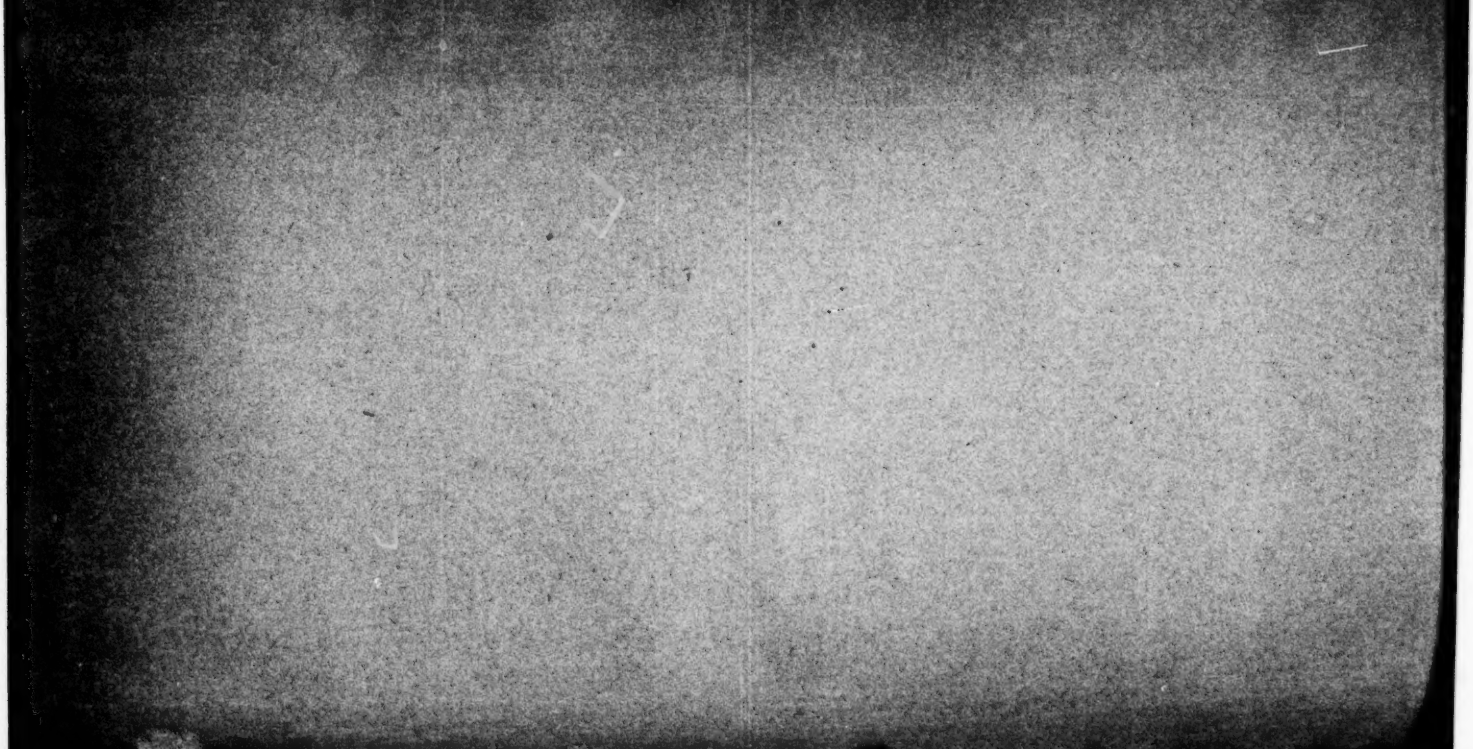

ising an agreement or compact "to fix the boundary line between said States, where the Mississippi River now, or formerly, formed the said boundary line," and to make mutual cessions of lands separated by changes in the river, settle jurisdiction as to offenses on the river, etc. P. 43.

The court finds no occasion in the constitutions, laws or decisions of the two States, or in acquiescence, and practices of the inhabitants of the disputed territory in recognition of another boundary, to depart from the principle which makes equality of navigation the controlling consideration in fixing the boundary between States separated by a navigable stream. P. 44.

In case of an avulsion, the boundary line is to be fixed at the middle of the main channel of navigation as it was just previous to the avulsion. P. 45.

The location of the disputed line will be left in the first instance to commissioners to be appointed by the court upon suggestions of counsel, with power to take further proofs as may be authorized by the interlocutory decree to be entered herein. P. 47.

THE case is stated in the opinion.

Mr. Herbert Pope, with whom *Mr. John D. Arbuckle*, Attorney General of the State of Arkansas, *Mr. John M. Moore* and *Mr. Albert M. Kales* were on the brief, for plaintiff.

Mr. Garner W. Green, with whom *Mr. Ross A. Collins*, Attorney General of the State of Mississippi, *Mr. Gerald Fitzgerald*, *Mr. George F. Maynard* and *Mr. Marcellus Green* were on the brief, for defendant.

MR. JUSTICE DAY delivered the opinion of the court.

This is a suit brought to determine a portion of the boundary line between the States of Arkansas and Mississippi. It appears that at the place in dispute the Mississippi River formerly had its course from Friar's Point in a southwesterly direction, then made a turn to the south, flowing in a southerly direction, then a turn towards the

west in the shape of a half moon, then a sharp turn to the north and flowing northerly, and thence westerly, making a bend in the river in the shape of a horseshoe, which was known as Horseshoe Bend. It is averred in the bill, that in 1848 the river suddenly left its course and ran westerly across the points of the bend, cutting off a tract of land which has become known as Horseshoe Island. The answer avers that this avulsion occurred in 1842; but the exact date is immaterial. That it did occur is clearly established, and it is generally spoken of in the testimony as happening in 1848. We may say preliminarily that we find no substance in the contention of the respondent that the allegations of the answer must be taken as true for want of replication. Under new Equity Rule 31 in a case of this character no replication is required in order to make the issues.

The State of Arkansas contends that the old course of the river before the avulsion was within a body of water now known as Horseshoe Lake or Old River, a body of water of considerable length and depth. The State of Mississippi contends that the old river ran through a body of water still remaining, but considerably further to the north, and known as Dustin Pond, and that before the avulsion the course of the river on the upper side of the Bend was considerably to the westward of the course claimed by Arkansas, and ran where now there is a slough not far from the middle of Horseshoe Island. These diverse claims are illustrated by an examination of the map, exhibit A, attached to the bill.

As we view the case it is practically controlled by the decision of this court in *Arkansas* v. *Tennessee*, 246 U. S. 158. In view of that decision we are relieved of the necessity of a discussion in detail of much that is urged upon our attention now. Arkansas was admitted to the Union June 23, 1836 (5 Stat. 50, 51) by an act of Congress which as to its boundaries provided:

"Beginning in the middle of the main channel of the Mississippi river, on the parallel of thirty-six degrees north latitude, running from thence west, with the said parallel of latitude, to the Saint Francis river, thence up the middle of the main channel of said river to the parallel of thirty-six degrees thirty minutes north; from thence west to the southwest corner of the State of Missouri; and from thence to be bounded on the west, to the north bank of Red river, by the lines described in the first article of the treaty between the United States and the Cherokee nation of Indians west of the Mississippi, made and concluded at the city of Washington, on the 26th day of May, in the year of our Lord one thousand eight hundred and twenty-eight; and to be bounded on the south side of Red river by the Mexican boundary line, to the northwest corner of the State of Louisiana; thence east with the Louisiana State line, to the middle of the main channel of the Mississippi river; thence up the middle of the main channel of the said river to the thirty-sixth degree of north latitude, the point of beginning."

Mississippi had previously been admitted to the Union by an act of Congress April 3, 1818, (3 Stat. 348), which provided:

"Beginning on the river Mississippi at the point where the southern boundary line of the state of Tennessee strikes the same, thence east along the said boundary line to the Tennessee river, thence up the same to the mouth of Bear Creek, thence by a direct line to the northwest corner of the county of Washington [Alabama], thence due south to the Gulf of Mexico, thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl river with Lake Borgne, thence up said river to the thirty-first degree of north latitude, thence west along the said degree of latitude to the Mississippi river, thence up the same to the beginning."

It will be observed that the language of the Mississippi act, so far as now important to consider, fixes the boundary upon the Mississippi River as "up the same to the beginning," and the language of the Arkansas act is: "beginning in the middle of the main channel of the Mississippi river . . . thence east, with the Louisiana State line, to the middle of the main channel of the Mississippi river, thence up the middle of the main channel of the said river to the thirty-sixth degree of north latitude, the point of beginning."

The State of Arkansas contends that these acts of Congress fix the middle of the channel of navigation as it existed before the avulsion as the boundary line between the States. By the State of Mississippi it is contended that the boundary line is a line equidistant from the well defined banks of the river. Language to the same effect as that contained in the acts of admission now before us was before this court in the case of *Arkansas* v. *Tennessee*, *supra*, and in that case the subject was considered, and the meaning of the Arkansas act, and similar language in the act admitting the State of Tennessee, was interpreted. The rule laid down in *Iowa* v. *Illinois*, 147 U. S. 1, was followed, and it was held that where the States of the Union are separated by boundary lines described as "a line drawn along the middle of the river," or as "the middle of the main channel of the river," the boundary must be fixed at the middle of the main navigable channel, and not along the line equidistant between the banks. We regard that decision as settling the law, and see no reason to depart from it in this instance.

It is urgently insisted that the laws and decisions of Arkansas and Mississippi are to the contrary, and our attention is called to Joint Resolution of Congress of 1909, 35 Stat. 1161, which provides:

"That the consent of the Congress of the United States is hereby given to the States of Mississippi and Arkansas

to enter into such agreement or compact as they may deem desirable or necessary, not in conflict with the Constitution of the United States, or any law thereof, to fix the boundary line between said States, where the Mississippi River now, or formerly, formed the said boundary line and to cede respectively each to the other such tracts or parcels of the territory of each State as may have become separated from the main body thereof by changes in the course or channel of the Mississippi River and also to adjudge and settle the jurisdiction to be exercised by said States, respectively, over offences arising out of the violation of the laws of said States upon the waters of the Mississippi River." Approved January 26, 1909.

No specific agreement appears to have been entered into under this act; but it is insisted that Arkansas and Mississippi by their respective constitutions have fixed the boundary line, as it is now claimed to be by the State of Mississippi, and that such boundary line has become the true boundary of the States irrespective of the decision of this court in *Iowa* v. *Illinois*, *supra*, followed in *Arkansas* v. *Tennessee*, *supra*. We have examined the constitutions and decisions of the respective States, and find nothing in them to change the conclusions reached by this court in determining the question of boundary between States. A similar contention was made in *Arkansas* v. *Tennessee* as to the effect of the Arkansas and Tennessee legislation and decisions, and the contention that the local law and decisions controlled in a case where the interstate boundary was required to be fixed, under circumstances very similar to those here presented, was rejected. In that case the Arkansas cases, which are now insisted upon as authority for the respondent's contention, were fully reviewed. The Mississippi cases called to our attention, of which the leading one seems to be *The Steamboat Magnolia* v. *Marshall*, 39 Mississippi, 109, as well as the legislation of the

State, seem to sustain the claim that local jurisdiction and right of soil to the middle of the river, is fixed by a line equidistant from the banks. But whatever may be the effect of these decisions upon local rights of property or the administration of the criminal laws of the State, when the question becomes one of fixing the boundary between States separated by a navigable stream, it was specifically held in *Iowa* v. *Illinois*, *supra*, followed in later cases, that the controlling consideration is that which preserves to each State equality in the navigation of the river, and that in such instances the boundary line is the middle of the main navigable channel of the river. In *Arkansas* v. *Tennessee*, *supra*, p. 171, we said: "The rule thus adopted, [that declared in *Iowa* v. *Illinois*] known as the rule of the 'thalweg,' has been treated as set at rest by that decision. *Louisiana* v. *Mississippi*, 202 U. S. 1, 49; *Washington* v. *Oregon*, 211 U. S. 127, 134; 214 U. S. 205, 215. The argument submitted in behalf of the defendant State in the case at bar, including a reference to the notable recent decision of its Supreme Court in *State* v. *Muncie Pulp Co.* (1907), 119 Tennessee, 47, has failed to convince us that this rule ought now, after the lapse of twenty-five years, to be departed from."

We are unable to find occasion to depart from this rule because of long acquiescence in enactments and decisions, and the practices of the inhabitants of the disputed territory in recognition of a boundary, which have been given weight in a number of our cases where the true boundary line was difficult to ascertain. (See *Arkansas* v. *Tennessee*, *supra*, and the cases cited at p. 172.)

This record presents a clear case of a change in the course of the river by avulsion, and the applicable rule established in this court, and repeatedly enforced, requires the boundary line to be fixed at the middle of the channel of navigation as it existed just previous to the avulsion. The location and determination of such bound-

ary is a matter which we shall leave in the first instance to a commission of three competent persons to be named by the court upon suggestion of counsel, as was done in *Arkansas* v. *Tennessee*. See 247 U. S. 461. This commission will have before it the record in this case, and such further proofs as it may be authorized to receive by an interlocutory decree to be entered in the case. Counsel may prepare and submit the form of such decree.